

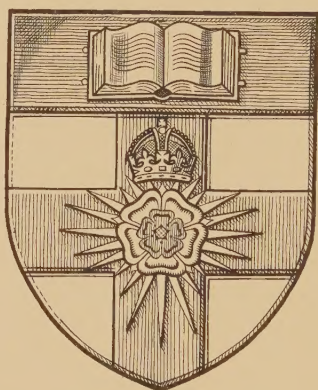
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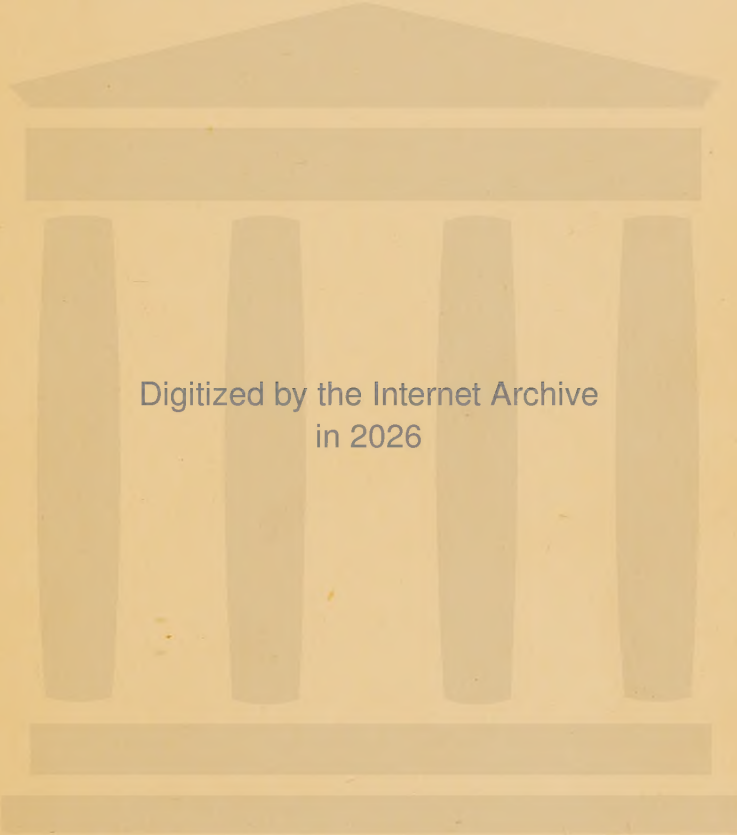
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THE
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JUDICIAL COMMITTEE OF THE PRIVY COUNCIL
AND
PEERAGE CASES

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1952

MEMORANDA

1951.

Dec. 24. THE RIGHT HON. VISCOUNT JOWITT, *sometime Lord High Chancellor of Great Britain, was created an Earl.*

1952.

Apr. 16. *This day* THE RIGHT HON. BARON GREENE of Holmbury St. Mary, *sometime a Lord of Appeal in Ordinary, died, aged 69.*

June 1. *The dignity of Baron of the United Kingdom was conferred upon* THE RIGHT HON. LORD SIMONDS, *Lord High Chancellor of Great Britain, by the name, style and title of Baron Simonds of Sparsholt, in the County of Southampton.*

Sept. 5. *This day* THE RIGHT HON. LORD MACMILLAN of Aberfeldy, *sometime a Lord of Appeal in Ordinary, died, aged 79.*

Sept. 26. THE HON. SIR CECIL ROBERT HAVERS, *one of the Justices of Her Majesty's High Court of Justice, Probate, Divorce and Admiralty Division, was transferred to the Queen's Bench Division.*

Sept. 26. WILLIAM ARTHUR DAVIES, ESQ., Q.C., *was appointed to be one of the Justices of Her Majesty's High Court of Justice, Probate, Divorce and Admiralty Division, in place of Mr. Justice Havers, and was afterwards Knighted.*

The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1952, will be as follows:—

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ERRATUM

Part II, p. 61. Headnote.

The reference to *Hosegood v. Moodie* should read [1951] W.N. 112.

[1952] A.C.

d

Appeal Cases

BEFORE

THE HOUSE OF LORDS

(ENGLISH—IRISH—AND SCOTTISH)

AND

THE JUDICIAL COMMITTEE

OF

HIS MAJESTY'S MOST HONOURABLE

PRIVY COUNCIL

FATUMA BINTI MOHAMED BIN SALIM
 BAKHSHUWEN AND ANOTHER . . . APPELLANTS;
 AND
 MOHAMED BIN SALIM BAKHSHUWEN . RESPONDENT.

J. C.*

1951
 Oct. 10.

ON APPEAL FROM THE COURT OF APPEAL FOR EASTERN AFRICA.

East Africa (Kenya) — Mohamedan law — Wakf — Validity — Privy Council decisions in appeals from India — Binding effect.

The respondent, a Mohamedan of the Shafi sect and the registered proprietor of certain lands in the Province of Seyidie in Kenya, purported to execute a deed of wakf of the lands, naming as beneficiaries his two daughters, the appellants, and then their children from generation to generation. The deed further provided that on failure of descendants the wakf properties should go to his nearest relatives, failing which, to certain named mosques. The respondent claimed that the deed created a private family wakf in perpetuity for the appellants and their descendants and was therefore void ab initio, and that the ultimate gifts in favour of the mosques were illusory and too remote. Since the date of the judgment of the Court of Appeal for Eastern Africa in the present case, which, following *Abdul Fata Mahomed Ishak v. Russomoy Dhur*

* *Present:* LORD SIMONDS, LORD NORMAND, LORD OAKSEY and SIR LIONEL LEACH.

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Chowdhry (1894) L.R. 22 I.A. 76, a decision of the Board in an appeal from India, held the wakf to be invalid, an ordinance had been enacted in Kenya similar to the Wakf Validating Act passed in India in 1913 and the Wakf Validating Decree of Zanzibar of 1946 making valid such wakfs as that now in question. It was not made clear before the Board, however, whether that ordinance had yet been brought into operation in the Province of Seyidie.

Held, on the assumption that the rights of the parties were to be determined without reference to any ordinance dealing specifically with wakfs, that the interpretation of the Mohamedan law given by the Judicial Committee of the Privy Council in a series of cases was not confined to that law as applied or administered in India; that on a question of Mohamedan law decisions of the Board given in appeals which came from India are binding on the Court of Appeal for Eastern Africa in appeals to that court from the Supreme Court of Kenya; and that accordingly the Court of Appeal for Eastern Africa were right in following the decision of the Privy Council in *Abdul Fata Mahomed Ishak v. Russomoy Dhur Chowdhry* (supra) and in holding that the wakf was invalid.

Said bin Muhammad bin Kassim el-Riami v. Wakf Commissioner, Zanzibar (1946) 13 E.A.C.A. 32, approved.

Talibu bin Mwijaka v. Executors of Siwa Haji, Decd. (1907) 2 E.A.L.R. 33, disapproved in so far as it implied that the Privy Council's interpretation of Mohamedan law was confined to that as applied or administered in India.

Principle in *Abdul Fata Mahomed Ishak v. Russomoy Dhur Chowdhry* (supra), *Bikani Mia v. Shuk Lal Poddar* (1892) I.L.R. 20 C. 116, and *Mujibunnissa v. Abdul Rahim* (1900) L.R. 28 I.A. 15, applied.

Judgment of the Court of Appeal for Eastern Africa affirmed.

APPEAL (No. 47 of 1950), by special leave in forma pauperis, from a judgment of the Court of Appeal for Eastern Africa (March 2, 1949) which affirmed a judgment of the Supreme Court of Kenya at Mombasa (August 26, 1948).

The following statement of the facts is taken from the judgment of the Judicial Committee:—This appeal raised a question as to the validity of two wakfs which the respondent purported to create by deeds of October 15, 1946, and May 8, 1947. It was the respondent himself who challenged the validity of the deeds: the appellants, who were his daughters, sought to sustain them. By the first of the deeds in question the respondent, as the registered proprietor of certain pieces of land in the Province of Seyidie which were mentioned in the schedule thereto, consecrated and dedicated permanently the said pieces of land as wakf properties and thereby transferred to himself as first trustee of the said wakf all his right, title and interest therein as wakf under the Mohamedan Sheria on trust to make the payments therein

mentioned out of the income thereof and to distribute the residue of such income among the beneficiaries thereafter named, namely, the appellants and the survivor of them, and after the death of such survivor to their "children and the survivors of "them during their lifetimes and thereafter in the same way to "their children and to the children of their children from generation to generation in equal shares." And the deed proceeded: "In the event there is no descendant left in existence the benefit "of the wakf properties will go to my nearest relatives, failing, "the income of the wakf will go to Mwinyi Kombo Mosque at "Kikoboni, Konzi Mosque and Majod Takwa and by that time "the trustee or trustees of the above-mentioned mosques will take "possession of the said properties in the event of the extinction "of my future generations." By the second of the two deeds the respondent purported to create a wakf of certain other lands in the same Province in precisely the same terms.

Within a short time of the execution of those deeds the respondent instituted the proceedings, out of which this appeal arose, claiming that they created a private family wakf in perpetuity for the appellants and their descendants and were void ab initio, and that the ultimate gifts in favour of the mosques were illusory and too remote. The appellants contended that the wakfs were legal and "not void ab initio or at all according "to Mohamedan law and according to the custom existing among "Mohamedans in Mombasa, India and Zanzibar and elsewhere." The suit was heard by Bartley J. in the Supreme Court of Kenya at Mombasa on August 12, 1948. It appeared from evidence given by one of the Wakf Commissioners (a body appointed under the Wakf Commissioners Ordinance of the Colony), who produced the register of wakf deeds, that a wakf to beneficiaries and their children from generation to generation and finally to a mosque was a common kind of wakf, and so was a wakf to children from generation to generation and then to nearest relatives and then to a mosque. The judge, holding himself bound by the judgment of the Court of Appeal for Eastern Africa in *Said bin Muhammad bin Kassim el-Riami v. Wakf Commissioner, Zanzibar*,¹ pronounced against the validity of the deeds.

The appellants appealed to the Court of Appeal for Eastern Africa (Sir Barclay Nihill P., Edwards C.J. and Bourke J.), and their appeal was unanimously dismissed. The President of the court observed that for the appellants to succeed they must

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¹ (1946) 13 E.A.C.A. 32.

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establish by cogent and overwhelming argument that the decision of the court in the Zanzibar case, to which reference has just been made, was wrong because the court was not fully seized of the correct principles of Mohamedan law applicable to such a case. He conceded that, as in that case the respondent Commissioner was not represented before the court, a great deal of high authority from unimpeachable sources might not have been cited to the court, but thought that, in any case, no other conclusion could have been reached in view of the decision of the Board in the leading case of *Abdul Fata Mahomed Ishak v. Russomoy Dhur Chowdhry*.² That case had decided that a perpetual family settlement made as wakf was not legal merely because there was an ultimate but illusory gift to the poor. In that view the other judges concurred.

1951. July 17, 18, 19, 23. *Dingle Foot, Ralph Millner and D. J. Thompson* for the appellants. Both the trial court at Mombasa and the East African Court of Appeal held that the wakf was invalid on the same ground, namely, that they were bound by the decision of the Board in *Abdul Fata's* case.² That case dealt with Muslims of the Hanafi school, and the Board decided that in British India—and in terms the decision was confined to British India—such a disposition as that now in question was not permitted by Muslim law as administered in British India. That decision gave rise to a great deal of controversy in India, and in the result legislation was passed specifically declaring that Moslems had the right to make settlements by way of wakf in favour of their families, children and descendants.

Outside India, it is submitted, the position has always been different. In cases from 1907 until 1923 it was held in Kenya and Zanzibar that wakfs of this type were entirely lawful, the judges there holding that they were not bound by decisions in Indian cases, even though they might be decisions of this Board. Wakfs of this type have also always been regarded as lawful in Palestine. In 1946, however, in *Said bin Muhammad bin Kassim el-Riami v. Wakf Commissioner, Zanzibar*,³ the East African Court of Appeal decided that they were bound by the Board's decision in *Abdul Fata's* case.⁴ In the present case the matter was fully argued and both courts below have arrived at the same conclusion.

There are three issues in this appeal. (i) Whether the courts

² (1894) L.R. 22 I.A. 76.

⁴ L.R. 22 I.A. 76.

³ 13 E.A.C.A. 32.

below were right in holding that they were bound by the decisions of the Board in the Indian cases. (ii) If they are so bound, whether the present case can be differentiated from *Abdul Fata's* case.⁴ It is submitted that it can be, first, because there is a difference between the Hanafi and Shafi sects, and, secondly, because in *Abdul Fata's* case⁴ the gift was to the wakif himself—he was to enjoy the exclusive right to the property—and the Board's judgment appears to turn to some extent on that factor. In the present case the wakf was in favour of the daughters and the donor merely came in as trustee; he was not in any sense a beneficiary. (iii) If the appellant is wrong on the first two points, then the question will arise whether the decision of the Board in *Abdul Fata's* case⁴ is one which ought now to stand in view of authorities which have become available since 1894. It is appreciated that the Board are always reluctant to overrule their own decisions, and that very substantial grounds must be shown before they will do so, but there are cases where that has been done when matters have been brought to the notice of the Board which were not available when the original case was heard.

If the decision in *el-Riami's* case⁵ stands it means that a considerable number of wakfs entered into now appear to be invalid: apart from the present case, that is the only other case on this matter which has come before the East African Court of Appeal. *Abdul Fata's* case,⁴ which was applied in *el-Riami's* case,⁵ was specifically directed to Mohamedan law as administered in India, and the Board based themselves on decisions of the Indian High Courts. Following that decision the Indian legislature passed the Mussalman Wakf Validating Act, VI of 1913, and the Mussalman Wakf Validating Act, XXXII of 1930, which gave retrospective effect to the Act of 1913, the result of which was to validate wakfs of the kind now in question. The matter was thus set at rest in India by legislation. A similar measure was passed in Zanzibar in 1946 after the decision in *el-Riami's* case⁵—the Wakf Validating Decree, No. 5 of 1946.

In Kenya—and the present wakf was made there—Hamilton J. in 1907, in *Talibu bin Mwijaka v. Executors of Siwa Haji, Decd.*,⁶ said of the wakf there in question that while on the one hand the court is “to have regard to and be guided by the” general principles of the law of Islam, on the other, whatever “respect it may pay to the decisions of the Privy Council, it is

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⁴ L.R. 22 I.A. 76.⁵ 13 E.A.C.A. 32.⁶ [1907] 2 E.A.L.R. 33.

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"not bound by those decisions. . . . The Mohamedan law in
"East Africa has, however, not been subjected to the same
"modifying influence as in India, and remains the same as when
"the Min Haj was written in the sixth century of the Hejira."
A further judgment by the same judge in *Seif bin Abdulla v. Administrator General*⁷ proceeded on the distinction between the Shafi and Hanafi sects, and on the assumption that *Abdul Fata's* case⁸ did not apply. That was the last reported case in the Supreme Court of Kenya until the present case; so from 1907 the law was taken as laid down by Hamilton J.

The Zanzibar cases *Suleman bin Ahmed v. Salem bin Abdalla el-Wardi*⁹ and *Ali bin Nassor bin Khalad v. Zwena binti Hamood*¹⁰ show that throughout the matter was dealt with in Zanzibar on the basis that a wakf of this kind was valid. In the last case from Zanzibar, *Shawana binti Seif v. Ali bin Said*,¹¹ it was said that "the rules of interpretation adopted by the courts
"in India, though of great interest and value for comparison, are
"not binding." The position in Zanzibar was therefore really the same as in Kenya for a considerable number of years at any rate. Those decisions show that the law in East Africa is not necessarily the same as in India, and they also assist the appellants on the second submission, namely, that there is a distinction to be drawn between Hanafi and Shafi sects.

So the position up to 1946 was that those decisions stood and everybody proceeded on the assumption that wakfs of this sort were good. Then in 1946 came the decision in *el-Riami's* case,¹² as the result of which the Zanzibar Government passed new legislation. The present respondent took advantage of that decision to seek to have this wakf held to be invalid, and this case is the first occasion on which the matter has been fully considered by the East African Court of Appeal. An ordinance has now been passed by the Legislative Council in Kenya in terms similar to the Indian and Zanzibar measures, but until the Governor chooses to make an order it is not the law which governs this case; so although this ordinance has been passed by the Legislative Council in Kenya, it is submitted that it has no bearing on the appeal now before the Board.

The position in India after 1894 up to 1913 (when the Validating Act was passed) did not obtain in any other Muslim community: for the position in Palestine see The Land Law of

⁷ [1915] 6 E.A.L.R. 74.

⁸ L.R. 22 I.A. 76.

⁹ [1910] 1 Z.L.R. 328.

¹⁰ [1911] 1 Z.L.R. 365.

¹¹ [1923] 3 Z.L.R. 6.

¹² 13 E.A.C.A. 32.

Palestine, by Goadby and Doukhan (1935), p. 69. The law in India on this matter as declared by decisions of the Indian High Courts and even by this Board does not necessarily apply in other places. It is clear that when these matters came up before the Indian High Courts in the late 80's and the early 90's of last century those courts held themselves bound by authority. The principal case was *Bikani Mia v. Shuk Lal Poddar*,¹³ and it clearly appears from certain passages in the majority judgments in that case that they were not basing themselves on the sources of Muslim law at all, but treating the matter as concluded by authority. It is submitted that if they had been in the position, which the courts in Kenya were, of being enjoined to deal with Mohamedan law unencumbered by authority, they might very well have arrived at a different conclusion. The first decision in which this matter was dealt with was *Abdul Ganne Kasam v. Hussien Miya Rahimtulla*.¹⁴ That case turned on the meaning to be attached to the word "charity," which, it is submitted, is to be given a wider connotation in Muslim law than in English law. [Reference was also made to *Rajah Deedar Hossein v. Rance Zuhoor-oon Nissa*.¹⁵]

If it be right that the African courts are not bound by the Indian decisions, then it is submitted that a wakf of this sort is valid according to the original sources of Muslim law: The Hedaya, Hamilton (2nd ed., 1870), pp. 231, 237; Macnaghten's Principles and Precedents of Moohummudan Law (2nd ed., 1860), p. 340, Case VIII, and p. 450; Baillie's Digest of Mahomedan Law (2nd ed., 1876), Bk. 9, p. 557; (the authority of the respective textbooks is referred to in Morley's Digest of Indian Cases, vol. I, pp. cclxvii, ccxciv); Tyabji's Principles of Muhhammadan Law (2nd ed.), pp. 32, 605, and para. 437; Ameer Ali's Mahomedan Law (4th ed.), vol. 1, p. 1; the Min Haj, Bk. 23, p. 290, which deals with the whole subject of wakfs and shows that a wakf in favour of the settlor was perfectly common, and there is nothing there to indicate that the validity of such a wakf was in question. There is nothing against the appellants at all outside India—all the above-cited authorities are in their favour, and quite clearly there can be a valid wakf of one or more generations. If *Abdul Fata's* case¹⁶ had come up from Africa it might very well have been decided differently. The fullest review of the sources of Mohamedan law is that now to be found in Ameer Ali's

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¹³ [1892] I.L.R. 20 C. 116.¹⁴ (1873) 10 B.H.C.R. 7, 12.¹⁵ (1841) 2 Moo.I.A. 441.¹⁶ L.R. 22 I.A. 76.

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Mahommedan Law (4th ed.), vol. 1, at pp. 192-5. The authorities on which he relies are the Fath al-Kadir, which is mentioned in Morley's Digest of Indian Cases at p. cclxix of the Introduction, and the Fatawa al-Aalamgiri, which is at p. cclxxxix of the Preface to Morley. [The dissenting judgment of Ammer Ali, J., in *Bikani Mia's* case¹⁷ was also read.]

If the Board had had these other matters before it in 1894 it might very well have arrived at a different conclusion in *Abdul Fata's* case.¹⁸ In that case they proceeded on the basis of their own judgments in *Sheik Mahomed Ahsanulla Chowdhry v. Amarchand Kundu*¹⁹ and *Abdul Gafur v. Nizamudin*.²⁰ Since their decision in *Abdul Fata's* case¹⁸ on this particular point, the Board have never been asked to reconsider it until the present appeal. When all the fresh material added together, from inside and outside India, is looked at, this case comes within the rule in *Read v. Bishop of Lincoln*²¹ and is one in which the Board would be justified in re-examining the matter.

Quass and Handoo for the respondent. There is not a single case in Kenya where a wakf of this type has been held valid. The first time this matter came before the Court of Appeal in East Africa was in 1946, when they said that the wakf was bad because of *Abdul Fata's* case,²² and in the present case they said the same. That is the position in Kenya. In Zanzibar there is possibly one case that may perhaps assist the argument for the appellants. Reliance was also placed on the position in Palestine. According to the law in India, which, it is submitted, applied both in India and in Africa, there can be a wakf of any property. In Palestine there could only be a true wakf of one particular kind of land, namely, mulk land: Goadby and Doukhan, *Land Law of Palestine*, pp. 70, 75, 77. Further, in Palestine a wakf could only be created before a Muslim religious court.

The appellants' first question is a composite one. What the law in Kenya is must be ascertained before it can be said whether the courts in Kenya are bound to follow the Indian law. Further, it is one thing to say that they are not bound to follow the decisions of the courts in India, but another to say that they are not bound to follow decisions of this Board on appeal from India where the law to be applied is the same. It is submitted that the courts in Africa are bound by the decisions of this Board. The case for the respondent is based on Mohamedan law. Very

¹⁷ I.L.R. 20 C. 116.¹⁸ L.R. 22 I.A. 76.¹⁹ (1889) L.R. 17 I.A. 28, 37.²⁰ (1892) L.R. 19 I.A. 170, 177.²¹ [1892] A.C. 644, 654.²² L.R. 22 I.A. 76.

little help can be got by going back to the sources of Mohamedan law in the year 1951. In dealing with pure Mohamedan law there is no reason why there should be a different decision whether the court sits in India, Africa or anywhere else. It took nineteen years before the legislature in India acted after *Abdul Fata's* case,²² so it does not appear that that decision caused as much consternation as was suggested. It is not therefore necessary to trouble the Board with sources.

It was said for the appellants that in *Abdul Fata's* case²² the Board were not seeking to interpret Mohamedan law, but seeking to interpret it as applied by Indian judges. Of course they had that in mind, but to say that the Board, having the Indian decisions before them, ignored the Mohamedan law is a very grave statement and is contrary to the Board's decision. The present is not a case in which new matter has come to light. The growth of the cases can be traced: *Sheik Mahomed Ahsanulla Chowdhry v. Amarchand Kundu*²³; *Abdul Gafur v. Nizamudin*²⁴; *Mujibunnissa v. Abdul Rahim*²⁵; *Mutu Ramanadan Chettiar v. Vava Levvai Marakayar*²⁶; *Khajeh Solehman Quadir v. Nawab Sir Salimullah Bahadur*²⁷; *Balla Mal v. Ata Ullah Khan*.²⁸ So there are decisions which show that the Board has consistently followed *Abdul Fata's* case,²⁹ which expressly followed *Ahsanulla Chowdhry's* case.²³

For the appellants great stress was laid on what Hamilton J. said obiter in *Talibu bin Mwijaka v. Executors of Siwa Haji, Decd.*³⁰—that the decisions of the Privy Council were not binding in East Africa in that case. That was quite wrong. Another judgment of the same judge is *Seif bin Abdulla v. Administrator General*,³¹ where, as in the previous case, the wakf was set aside; so in the only two cases on which the appellants relied, apart from the Zanzibar case, the wakf was set aside. The Zanzibar position appears to be a little different, but it is submitted again that the judges do look to the Indian cases as authority. The first case from Zanzibar which was referred to is *Suleman bin Ahmed v. Salem bin Abdalla el-Wardi*,³² and here is a Zanzibar case following an Indian case, *Ahsanulla Chowdhry's* case.²³ Next, *Ali bin Nassor bin Khalad v. Zwena binti Hamood*³³ may be good Hanafi law, but it is submitted

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²² L.R. 22 I.A. 76.²³ L.R. 17 I.A. 28, 37.²⁴ L.R. 19 I.A. 170.²⁵ (1900) L.R. 28 I.A. 15, 23.²⁶ (1916) L.R. 44 I.A. 21, 26.²⁷ (1922) L.R. 49 I.A. 153, 165.²⁸ (1927) L.R. 54 I.A. 372, 374.²⁹ L.R. 22 I.A. 76.³⁰ [1907] 2 E.A.L.R. 33.³¹ [1915] 6 E.A.L.R. 74.³² [1910] 1 Z.L.R. 328.³³ [1911] 1 Z.L.R. 365.

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that it is not good law as administered in most countries. The wakf in *Shawana binti Seif v. Ali bin Said* ³⁴ would be a perfectly good wakf according to the decision of the Board in *Abdul Fata's* case.²⁹ And in another Zanzibar case, *Saleh v. Administrator General*,³⁵ the Chief Justice was plainly regarding himself as being bound by Indian authorities. There is no justification for the view that new light has been thrown on Mohamedan law since *Abdul Fata's* case ³⁸ by the above cases.

Mr. Ameer Ali was a member of the Board when *Abdur Rahim v. Narayan Das Aurora* ³⁶ was decided, in which the wakf was held to be valid, and the test was laid down as being that summarized by Lord Robertson giving the judgment of the Board in *Mujibunnissa v. Abdul Rahim* ³⁷: "It will be so" [i.e., the wakf will be valid] "if the effect of the deed is to give the "property in substance to charitable uses. It will not be so, if "the effect is to give the property in substance to the testator's "family." Lastly, it was suggested that the Board should take a different view from *Abdul Fata's* case ³⁸ because this is a Shafi and not a Hanafi case, but since *Abdul Fata's* case ³⁸ the Indian courts have treated the two schools on the same basis, and no distinction has been drawn on the point now in question, and it is submitted that no distinction can be drawn. *Abdul Fata's* case ³⁸ should be followed, and Mohamedan law as applied there by the Board is that which should be applied in Africa. For nearly sixty years that has been the law as applied in India—apart from the legislative provisions—and it is now much too late to say that all those decisions are wrong. *Read v. Bishop of Lincoln* ³⁹ dealt with a very different state of affairs from those here.

Dingle Foot in reply. A wakf of this sort is valid according to Muslim law in Palestine: *Land Law of Palestine*, Goadby and Doukhan, p. 70. With regard to the Kenya decisions, although it is true that the wakfs were held to be invalid, it is clear that the judge was proceeding throughout on the assumption that wakfs of this character were perfectly legal. As to the suggestion that it is now much too late to raise the matter of the correctness of *Abdul Fata's* case,³⁸ another case in which the Board reconsidered and dissented from its previous decision is *Ottoman Bank of Nicosia v. Chakarian*.⁴⁰ The present matter has never

³⁴ [1923] 3 Z.L.R. 6.

³⁵ [1938] 5 Z.L.R. 8.

³⁶ (1922) L.R. 50 I.A. 84.

³⁷ L.R. 28 I.A. 15, 23.

³⁸ L.R. 22 I.A. 76.

³⁹ [1892] A.C. 644.

⁴⁰ [1938] A.C. 260.

been fully canvassed since 1894, and it is not in all the circumstances too late now to reconsider *Abdul Fata's* case.⁴¹

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Oct. 10. The judgment of their Lordships was delivered by LORD SIMONDS, who stated the facts as set out above, and continued:—In the present appeal counsel has challenged the correctness of the judgment under review on a number of grounds. He has boldly urged that the decision in *Abdul Fata's* case⁴¹ should itself be reviewed in the light of material which, as he says, was not brought, or not adequately brought, to the knowledge of the Board. He has further contended that, whatever binding force that decision might (but for supervening legislation to which reference will be made) be regarded as having in the courts of India, in East Africa the courts must be guided by, and have regard to, the general principles of the laws of Islam according to which a wakf for the benefit of the donor's family is valid. And finally he has contended that, in any event, the present case is distinguishable from *Abdul Fata's* case⁴¹ in that here (1) the parties are of the Shafi sect, and (2) the donor had divested himself of all beneficial interest in the property.

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With the last contention their Lordships can deal in a few words. It is plain from the judgments of the courts below and from the notes of the arguments which appear on the record that the case proceeded on the footing that no relevant distinction on this point could be made between Shafi and Hanafi law. This might not have been fatal, if it had been shown to their Lordships' satisfaction that there was such a distinction which had for some reason been overlooked. But this was not done and, as their Lordships think, could not have been done. Nor is it for this purpose relevant to the question of the validity of the wakf that the donor divested himself of all beneficial interest in the property. It might, as their Lordships understand, be an additional reason in some schools of law for impeaching the deed if he had not done so, but the fact that he has done so cannot save it if it is otherwise invalid.

Their Lordships turn to the first ground of appeal. With the assistance of counsel they have carefully considered not only the so-called leading case (*Abdul Fata's* case),⁴¹ but numerous cases decided before and after that date in the courts of India and the Privy Council. In particular, they have examined what truly might be called the leading case in this branch of the

⁴¹ L.R. 22 I.A. 76.

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law, *Bikani Mia v. Shuk Lal Poddar*,⁴² in which Ameer Ali J. in a long dissenting judgment brought all the resources of his great learning to bear in support of the validity of such a wakf as that now under consideration. There is no doubt that that judge and Mahomedan lawyers in general who thought with him were convinced that the judgment was wrong. But it appears to their Lordships that, whatever views might have been entertained in the eighteenth and earlier centuries, by the end of the nineteenth the trend of judicial opinion was firmly set in favour of the view that such wakfs were invalid, and that the conclusions to which the High Court of Calcutta and this Board came were inevitable. And in many cases after *Abdul Fata's* case⁴³ the same conclusion was reached. As Lord Robertson said in *Mujibunnissa v. Abdul Rahim* ⁴⁴: "It will be so" [i.e., the wakf will be valid] "if the effect of the deed is to give the property in substance to charitable uses. It will not be so if the effect is to give the property in substance to the testator's family." If the result was not acceptable to Muslim sentiment, it was to the legislature that recourse must be had. And so in the event it happened, though after some delay. For by Acts of the Indian legislature of 1913 and 1930 it was enacted that just such wakfs as these should be valid.

Their Lordships are asked, nevertheless, to say that *Abdul Fata's* case⁴³ was wrongly decided, and the well-known authority of *Read v. Bishop of Lincoln* ⁴⁵ is invoked to justify a re-examination and restatement of the principles of Mohamedan law. This course they cannot adopt. It may well be that, since the decision in *Abdul Fata's* case⁴³ was given, Ameer Ali J. and other writers have elaborated the views so fully propounded in *Bikani Mia's* case,⁴² but it is impossible to suppose that what has been written since that date or, having been written before it, has now for the first time been brought to the notice of the Board, could have achieved what Ameer Ali J.'s vigorous dissent failed to do. Nor does it avail the appellants that in parts of the world outside India where Mohamedan law obtains, whether in Africa or in Asia, such wakfs as these are considered to be valid. Their Lordships are not satisfied of the general truth of this proposition; but, even if it were so, that would not be such fresh light as would justify the Board in reversing its previous decision.

Finally, the position in East Africa itself must be considered.

⁴² I.L.R. 20 C. 116.

⁴³ L.R. 22 I.A. 76.

⁴⁴ L.R. 28 I.A. 15, 23.

⁴⁵ [1892] A.C. 644.

In Zanzibar there had been a number of cases in 1910, 1911 and 1923 in which the validity of such wakfs as these was brought into question, and in these cases, though for particular reasons the wakfs were held to be invalid, it would be fair to say that the assumption was that apart from such reasons they were valid. But in 1946 in the Zanzibar case of *Said Bin Muhammad*,⁴⁶ to which reference has been made, the Court of Appeal for Eastern Africa held itself bound by the decision in *Abdul Fata's* case⁴³ and pronounced against their validity. As a result of this decision the legislature of Zanzibar passed a Wakf Validating Decree of June 20, 1946 (No. 5 of 1946), which materially corresponded with the Indian Acts of 1913 and 1930, and as recently as April of this year, since this case was before the Court of Appeal, passed an Amending Decree which does not affect the question.

It was, however, in the Colony of Kenya that the wakfs now in question were created, and in that Colony there was at the date of the judgment given by the Court of Appeal no ordinance affecting them. Their Lordships have been told that since that date an ordinance has been enacted in terms similar to those of the Indian enactments and the Zanzibar decree, but whether it has yet been brought into operation in the Province of Seyidie is not clear. Their Lordships must assume, and give their opinion on the assumption, that the rights of the parties are to be determined without reference to any ordinance dealing specifically with wakfs.

The question appears first to have come before the court in Kenya in 1907. In that year in *Talibu bin Mwijaka v. Executors of Siwa Haji*,⁴⁷ Hamilton J., after referring to the Native Courts Regulations of 1897 and the Order in Council of 1902, said: "These points taken together define the law which is to be applied by this court in such cases as that now before me; that is to say, that while on the one hand the court is 'to have regard to and be guided by the general principles of the Law of Islam,' on the other, whatever respect it may pay to the decisions of the Privy Council, it is not bound by those decisions. The importance of this liberty left to the court is peculiarly illustrated in the present instance as the law of wakf as originally understood by the commentators and Mohamedan jurists has in India since the commencement of the latter half of last century been profoundly modified by the decisions of

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⁴⁶ 13 E.A.C.A. 32.⁴⁷ [1907] 2 E.A.L.R. 33, 36.

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“ the Privy Council. A study of the question shows that while
“ the Mohamedan law, uninfluenced from outside sources, per-
“ mitted perpetuities and the erection of wakfs for family
“ aggrandizement solely, the influence of English judges and of
“ the Privy Council has gradually encroached on this position
“ until decisions given quite recently have decided that such
“ wakfs are illegal, and it has now been clearly established that
“ a wakf for family aggrandizement or security, the ultimate
“ beneficiaries of which are the poor, whether mentioned by name
“ or supplied by implication, are invalid. The Mohamedan law
“ in East Africa has, however, not been subjected to the same
“ modifying influence as in India, and remains the same as when
“ the Min Haj was written in the sixth century of the Hejira.”

Their Lordships do not doubt that the judge was correct in saying that the rights of the parties are governed by Mohamedan law, though it would not appear that this, now at least, rests in any way on the Native Courts Regulations. But they cannot accept the theory which appears to underlie his decision, that the interpretation of Mohamedan law given by this Board in a series of cases is confined to that law as applied or administered in India. On the contrary, it has not been suggested that, apart from the differences existing among the Shafi, Hanafi and other sects, which have no present significance, Mohamedan law is not the same in East Africa as in India. The appellants have themselves relied on its universality and invoke the text of the Koran and the writings of learned commentators who expounded the law not of East Africa or any part of it but of the whole Muslim world. In these circumstances their Lordships are as little justified in reviewing *Abdul Fata's* case⁴⁸ in an appeal from the courts of Kenya as they would be in an appeal (if that were now possible) from the courts of India. In *Said bin Muhammad v. Wakf Commissioner*,⁴⁹ already referred to, the experienced judges of the Court of Appeal for Eastern Africa did not doubt that on a question of Mohamedan law decisions of the Privy Council in appeals from India must bind them in appeals from the High Court of Zanzibar. Their Lordships are of opinion that this was clearly the correct view and that it must prevail also in appeals from Kenya.

For these reasons their Lordships will humbly advise His Majesty that this appeal should be dismissed.

Solicitors: *T. L. Wilson & Co.; Hy. S. L. Polak & Co.*

⁴⁸ L.R. 22 I.A. 76.

⁴⁹ 13 E.A.C.A. 32.

[HOUSE OF LORDS.]

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ST. AUBYN AND OTHERS APPELLANTS;
 AND
 ATTORNEY-GENERAL RESPONDENT.

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Apr. 17, 18,
 19, 23, 24,
 25, 26, 30;
May 1;
July 12.

[APPEAL AND CROSS-APPEAL.]

Revenue — Estate duty — Tenant for life — Settled property — Sale to limited company and subsequent transactions—Finance Act, 1940 (3 & 4 Geo. 6, c. 29), ss. 43 (1) (2), 46, 56 (1) (2), 46, 47, 58 (2) (4) (5).

On March 21, 1927, a company was incorporated under the Companies Acts with a nominal capital of £200,000, divided into 200,000 shares of £1 each. At that date certain freehold estates, together with investments representing capital money and certain equitable interests, were, by the joint effect of a resettlement dated April 26, 1879, and a deed poll dated January 9, 1905, held on certain trusts subject to a general overriding power of appointment exercisable by A (who was tenant for life in possession) and B (who was a trustee of the resettlement but had no beneficial interest thereunder). By a deed poll dated March 23, 1927, A and B exercised their overriding power of appointment so as to authorize the transactions subsequently carried out.

By an agreement dated March 24, 1927, to which A, B and the company were parties, it was agreed that all the settled property should be sold to the company, the total consideration being £1,700,000 of which £950,000 was to be paid to the trustees of the resettlement in cash and the balance, £750,000, in forty half-yearly instalments. On the same day the company allotted 50,000 ordinary shares of £1 each to the trustees at a premium and 100,000 7 per cent. preference shares of £1 each to A at par. The sale of the settled property to the company was completed on March 26, 1927, and the £950,000 payable by it was paid immediately to the trustees who forthwith repaid to it £850,000 for the shares issued to them. The net result was that the settled property was converted into 50,000 fully paid ordinary shares, the right to receive from the company £750,000 by forty equal instalments and a sum of £100,000.

By a deed poll dated March 28, 1927, A and B exercised their overriding power to direct that the sums of £100,000 and £750,000 payable by instalments should be held in trust for A absolutely. The sum of £100,000 was thereupon paid to A and a like amount was immediately paid by him to the company in consideration of the

* *Present*: LORD SIMONDS, LORD NORMAND, LORD OAKSEY, LORD RADCLIFFE and LORD TUCKER.

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allotment and issue to him of the 100,000 preference shares on March 24, 1927. By a further deed poll dated March 29, 1927, new trusts were declared as to the property remaining subject to the resettlement, by which the life interest of A in the 50,000 shares was extinguished and he was excluded from all benefit from them and the income from them.

A died on November 10, 1940, having during the three preceding years received from the company sums amounting in the aggregate to £3,000 in each year by way of loan. Estate duty having been paid on the principal value of the outstanding instalments of the sum of £250,000 and on the preference shares, no point arose in connexion with them. The question of estate duty arose in connexion with the 50,000 ordinary shares and the sums received by way of loan:—

Held, that the claim for estate duty on the shares was not well founded so far as it was based on section 43 of the Finance Act, 1940, since after A's surrender of his life interest in them they were "thenceforward retained to the entire exclusion of [A] and of any "benefit to him by contract or otherwise" within subsection (2) of section 43; further, though A retained his interest in part of the settled property while surrendering his interest in the shares, the condition as to his entire exclusion from any interest in them was satisfied even on the basis of the "statutory hypothesis" in section 56 of the Act, which admittedly applied to the company.

Held, further (1) (*per* Lord Normand, Lord Radcliffe and Lord Tucker, Lord Simonds and Lord Oaksey dissenting) that A must be deemed to have transferred to the company otherwise than "in a fiduciary capacity" the investments and equitable interests subject to the settlement, within the meaning of sections 46 and 58 (2) (4) and (5), and (2) unanimously, that "benefits" (*viz.*, the loans) had accrued to him from the company within three years ending with his death, within the meaning of sections 46 and 47, and that accordingly under section 46 (1) the assets of the company, which was one to which the section applied, were deemed for the purposes of estate duty to be included in the property passing on his death to an extent determined by reference to the proportion that the aggregate amount of the benefits bore to the company's net income.

Per Lord Simonds, Lord Oaksey and Lord Normand; Lord Radcliffe and Lord Tucker dissenting: In paying cash for the 100,000 preference shares for which he subscribed A did not transfer property to the company within section 46 (1) and section 58.

Per Lord Simonds, Lord Oaksey and Lord Tucker, Lord Normand and Lord Radcliffe dissenting: In transferring the settled land to the company A was exercising his powers under the Settled Land Acts and acting "in a fiduciary capacity," and this capacity subsisted despite his other relations to the whole operation, so that the transfer was outside the scope of section 46 (1) and section 58.

Decision of the Court of Appeal (*sub nom. Attorney-General v. St. Aubyn*) [1950] 2 K.B. 429 reversed.

APPEAL and cross-appeal from the Court of Appeal (Evershed M.R., Somervell and Jenkins L.JJ.). H. L. (E.)

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The original appeal was by the trustees of a resettlement dated April 26, 1879, from an order of the Court of Appeal dated April 5, 1950, so far as it declared, reversing an order of the King's Bench Division (Croom-Johnson J.) dated May 20, 1949, that on the death of the second Baron St. Levan estate duty became payable in respect of funds comprised in the resettlement under section 43 of the Finance Act, 1940, in conjunction with section 56 of the same Act (which in certain circumstances impose a charge of estate duty in respect of property in which a life interest formerly vested in a deceased person has been determined in his lifetime). The cross-appeal was on behalf of His Majesty from the same order so far as it refused to adjudicate on an alternative claim, which had been dismissed by the King's Bench Division, for estate duty under section 46 of the same Act (which charges estate duty on the death of a person who has transferred property to a privately controlled company as is therein mentioned and who has derived benefits from the same company in the three years immediately before his death).

The facts and the relevant sections of the Finance Act, 1940, are fully set out in the opinion of Lord Simonds.

Sir Andrew Clark K.C., Pascoe Hayward K.C. and Norman Armitage for the appellants.

Sir Frank Soskice A.-G., Upjohn K.C. and J. H. Stamp for the Crown.

The arguments sufficiently appear from the opinions of their Lordships.

Their Lordships took time for consideration.

July 12. LORD SIMONDS. My Lords, this appeal and cross-appeal are brought from an order of the Court of Appeal, by which that court as to the subject-matter of the appeal reversed an order of Croom-Johnson J., and as to the subject-matter of the cross-appeal thought fit to make no order.

The facts of the case are somewhat involved but present no real difficulty. It is in the application to them of the relevant sections of the Finance Act, 1940, that I have found it impossible to reach any conclusion that is wholly satisfactory. I will give a broad outline of the relevant facts supplementing it as occasion demands.

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Immediately before the execution by the late Lord St. Levan, who died on November 10, 1940, and to whom I will refer as Lord St. Levan, of the instruments dated in March, 1927, which are next mentioned, he was, under a resettlement dated April 26, 1879, tenant for life in possession of certain settled property consisting of (a) freehold lands in the counties of Devon and Cornwall, (b) investments representing capital moneys arising under the resettlement, and (c) equitable interests which by virtue of the Law of Property Act, 1925, represented certain undivided shares in land which at the date when that Act came into operation were subject to the resettlement. The whole of the settled property was under the resettlement and a deed poll dated January 9, 1905, subject to an overriding general power of appointment exercisable by Lord St. Levan and Sydney Alexander Ponsonby (hereinafter called "Mr. Ponsonby") who was one of the trustees of the resettlement but had no beneficial interest thereunder. The subsequent limitations of the resettlement, as varied by the said deed poll and other instruments, were such as to cause the settled property to devolve together with the Barony of St. Levan, which on the death of Lord St. Levan without having had a son devolved on and is now held by his nephew Francis Cecil St. Aubyn.

On March 21, 1927, St. Aubyn Estates Ltd. (hereinafter called "the company") was incorporated under the Companies Acts, 1908 to 1917 (by the name of St. Aubyn Settled Properties Ltd. which was afterwards changed), with a nominal capital of £200,000, divided into 200,000 shares of £1 each, with power to issue any part of its capital with such preferential rights as might be thought expedient. The company's memorandum of association was subscribed by seven persons, including Lord St. Levan and Mr. Ponsonby, each of whom agreed to take one share. These seven shares were held by the subscribers as nominees of the trustees of the resettlement. By the company's articles of association it was provided that Lord St. Levan should be the governing director of the company.

By a deed poll dated March 23, 1927, Lord St. Levan and Mr. Ponsonby exercised their overriding power of appointment in such manner as to authorize the transactions next mentioned.

By an agreement dated March 24, 1927, to which Lord St. Levan, Mr. Ponsonby and the company were parties, it was agreed that the whole of the settled property should be sold to the company for £1,700,000 of which £950,000 was to be paid to the trustees of the resettlement (hereinafter called "the

“trustees”) in cash on completion of the sale (which was to take place on March 26, 1927) and the balance of £750,000 was to be paid to the trustees in cash by 40 half-yearly instalments of £18,750 each (the first payment to be made on June 24, 1927) without interest except that any instalment not paid within 21 days of becoming due was to carry interest at 5 per cent. per annum from the date on which it ought to be paid until actual payment thereof.

On the same date (March 24, 1927) the company allotted 100,000 7 per cent. cumulative non-participating preference shares of £1 each to Lord St. Levan at par and 49,993 ordinary shares to the trustees at a premium of £16 a share.

By a deed dated March 25, 1927, Lord St. Levan as tenant for life directed, and he and Mr. Ponsonby in exercise of their overriding power of appointment ratified such direction, that the trustees should invest the capital money subject to the resettlement in ordinary shares of the company at the premium required by the company.

On March 26, 1927, the sale to the company of the freehold lands and equitable interests which I have already mentioned was completed by two conveyances of that date. The sales to the company of the investments already mentioned were completed on or about the same date by appropriate separate instruments. The consideration payable immediately in cash (£950,000) was so paid but as to £850,000 immediately repaid by the trustees to the company in consideration of the issue to them or their nominees of 50,000 ordinary shares of the company (including the shares for which the memorandum had been subscribed) at the price of £17 a share. The balance of £100,000 was dealt with as hereafter stated.

The net result of the transactions so far described was that the property formerly subject to the resettlement had been converted into (a) 50,000 fully paid ordinary shares of the company, (b) the right to receive from the company a capital sum of £750,000 by the instalments already mentioned, and (c) the above mentioned sum of £100,000 paid by the company to the trustees.

By a deed poll dated March 28, 1927, Lord St. Levan and Mr. Ponsonby, in exercise of their overriding power, appointed that the said sum of £100,000 and the said sum of £750,000 payable by instalments, and any interest which might become payable in respect of any instalment, should be held upon trust for Lord St. Levan and that he should be entitled thereto for his own sole use and benefit instead of for his life only.

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The trustees thereupon paid over the said sum of £100,000 to Lord St. Levan and he immediately paid the like amount to the company in consideration of the issue to him of 100,000 preference shares fully paid.

By a further, and final, deed poll dated March 29, 1927, Lord St. Levan and Mr. Ponsonby in exercise of their overriding power appointed new trusts of (in effect) the whole of the property then remaining subject to the resettlement, i.e., the 50,000 issued ordinary shares of the company. The terms of the new trusts so declared were somewhat complicated but they admittedly had the effect of extinguishing the life interest of Lord St. Levan in the 50,000 ordinary shares and of excluding him from all benefit so far as those shares and the income thereof were concerned.

The following further facts are not now in dispute:—(a) That the trustees are to be regarded for the purposes of section 43 (2) (a) of the Finance Act, 1940, as having assumed bona fide possession and enjoyment of the 50,000 ordinary shares immediately after the determination by the deed poll of March 29, 1927, of the late Lord St. Levan's life interest therein. (b) That the company is a company to which section 56 of the Finance Act, 1940, applies and was concerned in associated operations (as defined by section 59 of that Act) of which the determination of Lord St. Levan's life interest was one.

Lord St. Levan having, as I have said, died on November 10, 1940, claims for estate duty were made against his executors in respect of the outstanding instalments of the purchase money and the 100,000 preference shares which he still retained and these claims were admitted and paid. But other claims also were made which are the subject of the present appeal and cross-appeal. They were (a) a claim under section 43 of the Finance Act, 1940, against the appellants, the present trustees of the resettlement, for estate duty on the 50,000 ordinary shares of the company, and, alternatively, (b) a claim under section 46 of that Act against the company for estate duty on a proportion of the company's assets corresponding to the benefits accruing to Lord St. Levan from the company. These claims were not admitted and proceedings were accordingly begun by English Information for their enforcement. On May 20, 1949, Croom-Johnson J. dismissed the information in regard to both claims. His Majesty's Attorney-General appealed to the Court of Appeal, which allowed the appeal under claim (a) but made no order upon claim (b). From that order the appellant trustees have appealed to this House in respect of claim (a), and in respect of claim (b)

the Attorney-General has similarly appealed. To his appeal the trustees and the company are respondents. The two claims are for the purpose of the present proceedings admitted to be strictly alternative and it was for that reason that the Court of Appeal, having decided in favour of claim (a), refused to make any order upon claim (b). In the result your Lordships are deprived of the assistance which you would otherwise have had from the consideration by the learned judges of the Court of Appeal of the very difficult problems that arise under the latter claim.

The two claims, my Lords, are not only alternative but wholly independent of each other, and I find it convenient to deal with them separately.

I have said that the first claim arises under section 43 of the Finance Act, 1940, but this claim must be considered under two aspects. For the Crown, while contending that the claim would be valid, even if section 43 stood alone, invoke also the provisions of section 56 if their primary claim fails. I propose therefore first to consider the question whether there is a valid claim under section 43 and for the time being to disregard section 56.

Section 43, so far as relevant and in force at the death of Lord St. Levan, provided as follows:—“(1) Subject to the provisions “ of this section, where an interest limited to cease on a death “ has been disposed of or has determined, whether by surrender, “ assurance, divesting, forfeiture or in any other manner . . . “ and whether for value or not, after becoming an interest in “ possession, (a) if apart from the disposition or determination “ the property in which the interest subsisted would have passed “ on the death under section 1 of the Finance Act, 1894, that “ property shall be deemed by virtue of this section to be included “ as to the whole thereof in the property passing on the death “ (2) Where the relevant disposition or determination “ was bona fide effected or suffered three years before the death “ . . . the preceding subsection shall not have effect—(a) if bona “ fide possession and enjoyment of the property in which the “ interest subsisted was assumed immediately thereafter by the “ person becoming entitled by virtue of or upon the disposition “ or determination and thenceforward retained to the entire “ exclusion of the person who had the interest and of any benefit “ to him by contract or otherwise. . . .”

I apply the provisions of this section to the facts that I have stated. On March 27, 1927, Lord St. Levan had an interest in possession limited to cease on his death in the settled property which on that date had assumed the form of (1) 50,000 ordinary

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shares of the company and (2) the sum of £750,000 payable in the instalments that I have mentioned and (3) the sum of £100,000 paid or immediately payable by the company. But he had also jointly with Mr. Ponsonby an overriding general power of appointment which could be exercised so as to vest all or any part of the settled property in him absolutely. They so exercised it as to vest in him the properties I have numbered (2) and (3), and, when they had done so, he surrendered his life interest in the ordinary shares. It is agreed that bona fide possession and enjoyment of the shares was assumed immediately thereafter by the persons becoming entitled upon the determination of Lord St. Levan's interest. But was it—and this is the only question—“thenceforth retained to the entire exclusion of [Lord St. Levan] “and of any benefit to him by contract or otherwise?”

My Lords, I cannot think that any doubt could be entertained upon this matter but for the use which the Crown seeks to make of certain decisions, particularly *Attorney-General v. Worrall*¹ and *Grey v. Attorney-General*,² to which I will refer later. If A, being the owner in fee of an estate in Yorkshire and an estate in Wiltshire, gives outright to B his estate in Yorkshire, it is an irrelevant circumstance that he retains his estate in Wiltshire: equally it is irrelevant, if, being the tenant for life of the two estates, he surrenders his interest in one and retains it in the other: and equally so, if, his interest being not in two geographically separate estates but in land and capital moneys subject to the same settlement, he surrenders his interest in the one form of property and retains it in the other. But let it be supposed that he is neither the owner in fee, nor the tenant for life and nothing more, but that he is tenant for life with an overriding general power of appointment, by virtue of which he can dispose of all or any part of the settled property at his absolute discretion. I cannot doubt that, if he chooses so to exercise the power as to make some part of the settled property his own, it is wholly irrelevant that by a contemporaneous or later transaction he surrenders his life interest in other parts of it. It is true that he has disposed of his life interest in one part of the property and it is true that he has enlarged his life interest in the other part of it into an absolute interest, but these two truths do not add up to the proposition that the property in which he has surrendered his interest is not retained by the trustees to the entire exclusion of him and of any benefit to him by contract or otherwise.

¹ [1895] 1 Q.B. 99.² [1900] A.C. 124.

I do not think that the examples that I have given of cases, where duty would not be exigible in respect of property in which a life interest had been surrendered, were or could be seriously challenged. If so, it can only be due to a radical misconception of the facts in the present case that the learned Attorney-General pressed the claim under section 43 unaided by section 56. For though truly the overriding power of appointment was not vested in Lord St. Levan alone, there is nothing to suggest that there was a bargain of any kind between him and Mr. Ponsonby. They were together masters of the situation, and, if they thought fit to appoint to Lord St. Levan an absolute interest in part of the settled property, the effect, so far as section 43 is concerned, is precisely the same as if Lord St. Levan had had the sole power and had exercised it. It is not necessary to determine what the result might be if there had been a bargain between Lord St. Levan and the remaindermen or even between Lord St. Levan and Mr. Ponsonby. It is sufficient that these two in their united wisdom thought fit to do what he in his single wisdom, had he had the sole power, might have done. I am therefore of opinion that the claim for duty upon the ordinary shares, so far as it is based on section 43 alone, is not well founded. I will defer my observations on the cases, which I have mentioned, until an attempt has been made to discover the scope and effect of section 56.

Section 56 of the Finance Act, 1940, so far as relevant, provides as follows (the subsections being inverted for the sake of clarity). By subsection (2): "Where a company to which this section applies was concerned in the disposition or determination of an interest limited to cease on a death effected or suffered as mentioned in subsection (2) of section 43 of this Act . . . or was concerned in any one or more of associated operations of which the disposition or determination . . . formed one, the conditions as to the entire exclusion of the person who had the interest . . . and of any benefit to him, specified in the said subsection (2) . . . shall be treated as having been satisfied if and only if they would have been so treated in the circumstances aforesaid." The "circumstances aforesaid" so referred to are those stated in subsection (1) of the same section 56 in the following words: ". . . the following circumstances, namely, if the assets of the company had been held by it on trust for the members thereof and any other person to whom it is under any liability incurred otherwise than for the purposes of the business of the company wholly and exclusively, in accordance with the rights attaching to the shares in and debentures of the company

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H. L. (E.) “ and the terms on which any such liability was incurred, and if
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 St. AUBYN “ power to carry on the business of the company and to employ
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It is, as I have said, admitted that the company is a company to which the section applies. The assets of the company consisted of the settled property or the property for the time being representing it, and the members were at the relevant date (i.e., immediately before the surrender by Lord St. Levan of his life interest in the ordinary shares) the trustees as holders of the ordinary shares and Lord St. Levan as holder of the preference shares and as the person to whom the company owed the instalments of purchase money. This flows from the definitions of “ member ” and “ debenture ” in the Act (s. 59). Then—and here I paraphrase the subsection—the conditions as to the entire exclusion of Lord St. Levan from the property in which he surrenders his interest, i.e., the ordinary shares, and of any benefit to him by contract or otherwise are only satisfied, if they would have been so treated, i.e., would have been satisfied, if the company had held its assets on trust for the trustees and Lord St. Levan in accordance with the rights attaching to the ordinary and preference shares and the debenture.

My Lords, I must admit that I find this a bewildering conception. The Court of Appeal in a judgment delivered by Jenkins L.J. found it possible to give a meaning to the section and summarized its conclusion in words which I think it worth while to quote. “ We think,” they said,³ “ that for this purpose ‘ the property in which the interest subsisted ’ within the meaning of section 43 (2) (a) must be taken as being the settled property as it stood before the sale to the company, the subsequent creation of the different equitable interests which the statutory hypothesis supposes being merely in the nature of a preliminary carving up of the property into the appropriate beneficial interest with a view to securing the desired benefit to the deceased out of it upon the intended determination of his life interest. But even if we are wrong in this, and ‘ the ‘ property in which the interest subsisted ’ must, as Sir Andrew contended, be considered as consisting only of the residue of the property remaining after provision for the other interests, we are satisfied that the benefit taken by the deceased in the shape of the creation and vesting in him of the right to

³ [1950] 2 K.B. 429, 448.

“ receive the half-yearly instalments, though on this view not taking effect out of the ‘ property in which the interest subsisted,’ was on the facts so clearly referable to and connected with the determination of the deceased’s life interest in that property as to constitute a fatal objection to exemption under section 43 (2).”

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It had been stated earlier in the judgment ⁴ that the application of the statutory hypothesis (as it was conveniently called) was to eliminate completely the element of sale from the trustees to the company and the consequent conversion of the property and to make the case stand for the purpose of section 43 as if the property had been transferred to the company as trustee upon trust (1) to pay thereout to the trustees £750,000 by the instalments and on the dates mentioned to be held by them as capital moneys on trust for Lord St. Levan for life with remainders over, (2) subject thereto to raise and pay to Lord St. Levan £100,000 on whatever future event should be taken as corresponding for the purposes of the hypothetical trust to the winding-up of the company and in the meantime to pay him interest on that sum at 7 per cent. per annum out of the net income of the property, and (3) subject thereto upon trust both as to income and capital for the trustees upon trust for Lord St. Levan for life with remainders over in accordance with the terms of the settlement. And this view is emphasized by saying ⁵ that the right to receive the instalments of the £750,000 is converted into “ an equitable interest charged by way of primary trust on the entire capital and income of the settled property as it stood before the sale to the defendant company.”

My Lords, I will assume that the Court of Appeal rightly stated the effect of applying the statutory hypothesis to the facts of this case. The question whether duty is exigible still remains one of great difficulty.

Whatever the words, which have appeared in a series of Acts, might have meant to your Lordships if the matter were res integra, it cannot in face of the decision in *Attorney-General v. Worrall* ⁶ be denied that it is possible for possession and enjoyment of property not to be retained by the donee to the entire exclusion of the donor or of any benefit to him by contract or otherwise, though the donor himself no longer has any sort of interest in it. But the words, and particularly the word “ exclusion,” are singularly inapt to cover a benefit which does

⁴ [1950] 2 K.B. 429, 445.⁶ [1895] 1 Q.B. 99.⁵ Ibid. 445-6.

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not arise by way of reservation out of that which is given, and I am not disposed to travel further than I am constrained by authority along a line of interpretation which appears to me difficult to justify.

Two recent cases in the Privy Council are of great assistance on this matter. In *Munro v. Commissioners of Stamp Duties*,⁷ the facts were that the owner of a large area of land in New South Wales, on which he carried on the business of a grazier, in 1909 agreed with his six children that thereafter the business should be carried on by him and them as partners at will, the business to be managed by him and each partner to get a share of the profits. In 1913 he transferred by way of gift to his children or to trustees for them all his right, title and interest in the land. He remained a partner in the business until his death in 1929 and duty was then claimed in respect of the land because, as it was said, it had not been retained by the donees to the entire exclusion of him or of "any benefit to him of whatsoever kind "or in any way whatsoever whether enforceable at law or in "equity or not" (Stamp Duties Acts, 1920-1931, s. 102 (2) (d)). But on this Lord Tomlin, delivering the judgment of the Board, said,⁸ "What was comprised in the gift was, in the case of each "of the gifts to the children and the trustees, the property shorn "of the right which belonged to the partnership, and upon this "footing it is in their Lordships' opinion plain that the donee "in each case assumed bona fide possession and enjoyment of the "gift immediately upon the gift and thenceforward retained it to "the exclusion of the donor. Further, the benefit which the "donor had as a member of the partnership in the right to which "the gift was subject was not in their Lordships' opinion a "benefit referable in any way to the gift. It was referable to "the agreement of 1909 and nothing else, and was not therefore "such a benefit as is contemplated by section 102 (2) (d)."

Here are words of great significance. The benefit, if it is to attract duty to the subject of the gift, must be a benefit referable to it. The words are not easy to construe but they clearly import that the owner of property may in certain circumstances retain a benefit when he makes a gift and yet the subject-matter of the gift be not dutiable.

More important is the case of *Commissioner of Stamp Duties for New South Wales v. Perpetual Trustee Co. Ltd.*,⁹ for in that case the Judicial Committee took the opportunity of reviewing

⁷ [1934] A.C. 61.

⁹ [1943] A.C. 425.

⁸ Ibid. 67.

the earlier cases and in particular *Worrall's* case,¹⁰ *Grey's* case,¹¹ and *In re Cochrane*.¹² And it is to the last case that I must first turn, for the judgment of the Irish Court of Appeal was expressly approved by Lord Russell of Killowen delivering the opinion of the Board and its bearing on the case now under appeal will be seen to be immediate. For that reason I venture to repeat the facts substantially as stated by him. Sir Henry Cochrane was the mortgagee of estates in Mayo in a sum of £15,000 with interest at 4½ per cent. The mortgage debt and securities having been vested in trustees, Sir Henry by an indenture made in 1902 declared that they were to stand possessed thereof in trust out of the income to pay in each year to his daughter, Mrs. Day, the sum of £575 for her life, and after death on trust as to the principal sum for her children as therein mentioned with power to Mrs. Day to appoint an annual sum to a surviving husband during his life. If no child of Mrs. Day attained a vested interest in the trust funds, they were to be held in trust for Sir Henry absolutely and there was also a trust of the balance, if any, of the yearly income for Sir Henry absolutely. The trustees received the interest of the mortgage which amounted to £675 per annum and paid £575 to Mrs. Day and the balance to Sir Henry. In March, 1904, he directed them to pay the whole income to Mrs. Day, but, as he died within a year thereafter, this direction could not affect the claim to duty which the Crown made in respect of the entire sum of £15,000 as property passing on his death under section 2 (1) (c) of the Finance Act, 1894. It was held by Palles C.B., and his decision was affirmed by the Court of Appeal, which consisted of Walker L.C. and Fitzgibbon and Holmes L.JJ., that duty was not payable in respect of the £15,000 but only in respect of the values of Sir Henry's interest in the balance of income and his contingent interest in the principal sum. It is important to see how Lord Russell of Killowen summarizes the judgment of the Chief Baron. "Gift," he says,¹³ "in the context meant beneficial gift. A person who declares trusts of property only gives the beneficial interests covered by the trusts. Everything else he retains and does not give; and there is an entire exclusion of the donor from the property taken under the disposition of the gift. Sir Henry Cochrane obtained no benefit either by way of reservation out of the gift, or collaterally in reference to the gift." Then, after

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¹⁰ [1895] 1 Q.B. 99.¹¹ [1900] A.C. 124.¹² [1905] 2 I.R. 626; *affd.* in C.A. [1906] 2 I.R. 200.¹³ [1943] A.C. 425, 441.

H. L. (E.) citing Holmes L.J. he said,¹⁴ " If *In re Cochrane*¹⁵ was rightly
 1951 " decided, as their Lordships think it was, it covers the present
 ST. AUBYN " case." Lord Russell of Killowen then proceeded to a close
 v. analysis of *Grey v. Attorney-General*,¹⁶ convincingly showed that
 ATTORNEY- it was not inconsistent with *In re Cochrane*¹⁵ and said of it¹⁷:
 GENERAL. " There is nothing laid down as law in that case which conflicts
 Lord Simonds. " with the view that the entire exclusion of the donor from posses-
 " sion and enjoyment which is contemplated by section 11 (1) of
 " the Act of 1889 is entire exclusion from possession and enjoy-
 " ment of the beneficial interest in property which has been
 " given by the gift, and that possession and enjoyment by the
 " donor of some beneficial interest therein which he has not
 " included in the gift is not inconsistent with the entire
 " exclusion from possession and enjoyment which the subsection
 " requires."

It followed from the approval given to the decision in *In re Cochrane*¹⁸ that the claim against the Perpetual Trustee Co. Ltd. failed. In that case a settlor vested certain shares in trustees, of whom he was himself one, upon trusts for the benefit of an infant son but with a resulting trust for himself if the son did not attain the age of 21. It was contended that as the settlor (a) was a trustee and (b) had an equitable interest in reversion, there was not an entire exclusion of him and of any benefit to him of whatsoever kind and in any way whatsoever. The contention failed because the settlor¹⁹ in his capacity of donor " was " entirely excluded from possession and enjoyment of what he had " given to his son. . . . In the interval between the gift and his " death, the settlor received no benefit of any kind or in any way " from the shares, nor did he receive any benefit whatsoever " which was in any way attributable to the gift." As Dixon J. said in the same case in the High Court of Australia²⁰: " The " settlement contained nothing defeating, revoking or destroying " any interest given. It contained no reservation out of the " interest given and no recompense or benefit in reference to the " interest given."

It appears to me, my Lords, that this is nothing but the logical application to a more complex situation of the proposition which I venture to think was self evident, viz., that the life tenant of two separate pieces of property can surrender his life

¹⁴ [1943] A.C. 425, 442.

¹⁵ [1906] 2 I.R. 200.

¹⁶ [1900] A.C. 124.

¹⁷ [1943] A.C. 425, 445-6.

¹⁸ [1906] 2 I.R. 200.

¹⁹ [1943] A.C. 425, 440.

²⁰ (1941) 64 C.L.R. 482, 511.

interest in one and retain it in the other without duty becoming exigible in respect of the former. The question is what he has given: it may be a life interest in part of the settled property; it may be a part of the income of settled funds and that part may be a fixed sum which is payable in priority or the residue after the prior payment of a fixed sum thereout. I venture to think that much of the argument that was addressed to the House in this case and much of the confusion that has arisen in the past on this admittedly difficult branch of the law have been due to the failure to bear in mind that that of which enjoyment is to be assumed and retained and from which there is to be exclusion of the donor and any benefit to him by contract or otherwise is that which is truly given, a proposition which is obvious enough in the case of two separate estates but more difficult to follow and apply where trusts are declared of a single property which are not completely exhaustive in favour of a donee. It should at least be clear from the judgment of Lord Russell of Killowen that by retaining something which he has never given a donor does not bring himself within the mischief of the section. I venture to repeat in other words what I have already said when dealing with section 43 alone, for its underlying principle is not altered by an alliance with section 56. In the simplest analysis, if A gives to B all his estates in Wiltshire except Blackacre, he does not except Blackacre out of what he has given: he just does not give Blackacre. And if it can be regarded as a "benefit" to him that he does not give but keeps Blackacre, it is a benefit which is in no relevant sense (to use the language of Lord Tomlin) "referable" or (to use that of Lord Russell of Killowen) "attributable" to the gift that he made of the rest of the Wiltshire estate. Applying this principle to the artificial situation created by the statutory hypothesis, I see no reason for saying that that which Lord St. Levan gave was not retained by the donee to the entire exclusion of him and of any benefit to him by contract or otherwise. To avoid misunderstanding I must add that different considerations arise where the donor obtains some benefit which is "referable" to the gift or "attributable" to it. Thus, if in the present case there had been a bargain by which in consideration of the surrender of his life interest in part of the settled property Lord St. Levan had been enabled to enlarge his life interest in another part of it, it might well be that following *Worrall's* case²¹ I should be bound to hold that he had

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²¹ [1895] 1 Q.B. 99.

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not been excluded from the surrendered part. But as I have already pointed out, here was no bargain of any kind. What Lord St. Levan chose to give he gave, and what to keep he kept. He made no bargain and he was entirely excluded from, and obtained no benefit referable to, that which he gave.

My Lords, in order to test the claim under section 43 aided by section 56 I have been content to assume that the statutory hypothesis requires that the trusts upon which the company is to be deemed to hold its assets should be written out in the terms advocated by the Crown and accepted by the Court of Appeal. And even upon this footing I am satisfied that the claim must fail if the principle established in the cases that I have cited is applied. But I am far from being convinced that I am entitled to write out the trusts in a manner so favourable to the Crown's contention. It would perhaps be beyond the wit of the most skilful conveyancer to set out with any degree of accuracy the trusts which should correspond with the rights of the members of the company as that word is defined: for the legal relations in which the members stand to each other and to the company cannot be transmuted into those of trustee and cestui que trust. I need not however pursue this matter, since I hold that even on the ground which the Crown has chosen the claim for estate duty on the ordinary shares of the company fails and the appeal must be allowed.

The alternative claim which arises under section 46 of the Finance Act, 1940, must now be considered. It involves the consideration of provisions which are, I think, of unrivalled complexity and difficulty and couched in language so tortuous and obscure that I am tempted to reject them as meaningless.

I must set out not only section 46 but certain other sections which have to be read with it. They are as follows:—

“ 46.—(1) Where a person dying after the commencement of
“ this Act has made to a company to which this section applies
“ a transfer of any property (other than an interest limited to
“ cease on his death or property which he transferred in a
“ fiduciary capacity), and any benefits accruing to the deceased
“ from the company accrued to him in the three years ending
“ with his death, the assets of the company shall be deemed for
“ the purposes of estate duty to be included in the property pass-
“ ing on his death to an extent determined, in accordance with
“ subsection (2) of this section, by reference to the proportion that
“ the aggregate amount of the benefits accruing to the deceased
“ from the company bore to the net income of the company.

“(2) The proportion aforesaid shall be ascertained for each accounting year that fell wholly or partly within the three years ending with the death, by comparing the aggregate amount of the benefits accruing to the deceased from the company which accrued to him in that year with the net income of the company for that year, and the extent to which the assets of the company are to be deemed to be included in the property passing on the death shall be the average of the proportions so ascertained. . . .”

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“47.—(1) The following shall be treated as benefits accruing to the deceased from the company, that is to say—(a) any income of the company, and any periodical payment out of the resources or at the expense of the company, which the deceased received for his own benefit whether directly or indirectly, and any enjoyment in specie of land or other property of the company or of a right thereover which the deceased had for his own benefit whether directly or indirectly; . . . (2) In this Part of this Act the expression ‘periodical payment’ means a payment by way of dividend or interest, a payment by way of remuneration not being a single lump sum payment, and any other payment being one of a series of payments, whether inter-connected or not, whether of the same or of varying amounts and whether payable at regular intervals or otherwise. . . .”

“58.— . . . (2) A person shall be deemed for the purposes of this Part of this Act to have made a transfer of property to a company if the property came to be included in the resources of the company by the effect of a disposition made by him or with his consent or of any associated operations of which such a disposition formed one. . . . (4) References in this Part of this Act to a disposition’s being made by any person, to a power’s being exercised or exercisable by any person, or to any other act’s being done by any person, include references to its being made, or being exercised or exercisable, or being done, by him and another jointly or by another at his direction. . . . (5) References in this Part of this Act to a person having any power or control or doing any act in a fiduciary capacity shall be construed as references to his having that power or control or doing that act in a fiduciary capacity imposed on him otherwise than by a disposition made by him and in such a capacity only.”

The claim of the Crown rests on two conditions: first, it must be shown that Lord St. Levan transferred property to the company and did so in some other than a fiduciary capacity (for this

H. L. (E.) I will coin the expression “non-fiduciary capacity”), and
 1951 secondly, that benefits accrued to him from the company in the
 three years ending with his death.

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Upon the first of these questions numerous points arise for discussion. What property was transferred to the company by Lord St. Levan? So far as he transferred it, did he do so in a fiduciary capacity? What is the effect of the ratification and confirmation or further assurance by Lord St. Levan and Mr. Ponsonby contained in the several deeds of conveyance or transfer? What is the effect of the several subsections of section 58 which I have set out and how do they operate inter se? These and other points I must deal with seriatim.

The first point arises on the subscription by Lord St. Levan for 100,000 preference shares. For these he paid cash according to the ordinary use of language. Did he then “transfer property” to the company within the meaning of section 46? My Lords, I have no hesitation in saying that the payment of cash to a company upon a subscription for shares is not a transfer of property to the company. No one, lawyer, business man or man in the street, was ever heard to use such language to describe such an act and I decline to stretch the plain meaning of words in an Act of Parliament in order to comply with what is said to be its purpose. Lord Wensleydale’s familiar words (as Parke B. in *In re Micklethwait* ²²), which were cited by Lord Halsbury, L.C. in *Tennant v. Smith*, ²³ may again be repeated: “It is a well-
 “established rule, that the subject is not to be taxed without
 “clear words for that purpose; and also, that every Act of
 “Parliament must be read according to the natural construction
 “of its words.” Lord Halsbury adds that in a taxing Act it is impossible to assume any intention or governing purpose in the Acts to do more than take such tax as the statute imposes: it must be seen whether the tax is expressly imposed. This is true doctrine which I must bear in mind as I listen to the constant refrain of learned counsel for the Crown that this or that is just the transaction at which this or that section is aimed. The question is not at what transaction the section is, according to some alleged general purpose, aimed but what transaction its language, according to its natural meaning, fairly and squarely hits. Applying this, the one and only proper test, I say that when Lord St. Levan paid for his shares he did not transfer property to the company.

²² (1855) 11 Ex. 452, 456.

²³ [1892] A.C. 150, 154.

The next point arises in this way. The conveyance of the settled land to the company, to which I have already referred, took the form of a grant by Lord St. Levan in exercise of (to put it shortly) his Settled Land Act powers and the extended powers given by the St. Aubyn settlement and the deed poll of March 23, 1927. It is beyond question, first, that this grant operated to convey the fee to the company, and, secondly, that the grant by Lord St. Levan as tenant for life, whether made in pursuance of statutory or extended powers, was a transfer by him in a fiduciary capacity. But the conveyance contained not only a grant by Lord St. Levan. By it also he and Mr. Ponsonby in exercise of their general power of appointment "by way of ratification" appointed and confirmed unto the company the land which he had granted. Therefore, it was said, the property was not transferred by Lord St. Levan in a fiduciary capacity but by him and Mr. Ponsonby in a non-fiduciary capacity. This is not a valid argument. The ratification and confirmation and appointment could have no operation in law except to the extent to which the grant by Lord St. Levan was ineffective to convey the fee. *Ex concessis* that grant was wholly effective: therefore the ratification, etc., effected no transfer of property nor anything else.

The same point arises, but with a refinement upon it, in regard to the investments representing capital moneys of the settlement. These were transferred to the company by the trustees by the usual deeds of transfer. The trustees no doubt acted in a fiduciary capacity, but they acted (a) upon the direction of Lord St. Levan as tenant for life and (b) upon the exercise by Lord St. Levan and Mr. Ponsonby of their joint power of appointment "by way of ratification." Then, the argument runs, under section 58 (4) the transfer by the trustees becomes the transfer of those who directed it: and those who directed were not only Lord St. Levan as a tenant for life but he and Mr. Ponsonby in exercise of a non-fiduciary power. If Lord St. Levan was competent to direct the transfer under the Settled Land Act or under the extended powers given to him by the deed of March 23, 1927, then the argument fails for the reasons given in regard to the settled land: for the direction by Lord St. Levan and Mr. Ponsonby added nothing to that already given by Lord St. Levan. But at this point the argument opened a question of a far-reaching character, which I am sorry to have to decide without the assistance of judges who have a greater familiarity with such problems. It is the broad question whether it is competent

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for a tenant for life to direct the trustees to change an investment of capital moneys into another investment authorized by the Act or by the settlement. On this question counsel on either side agreed in saying that there was no direct authority and they agreed too that the reason for that was that the answer was clear. But unfortunately here harmony ended, for the clear answer given on the one side was the exact opposite of the clear answer given on the other. It falls therefore to your Lordships to determine a question which I should have expected to find well settled long ago.

Part III of the Settled Land Act, 1925, which is entitled "Investment or other application of capital money," provides by section 73 (1) that capital money arising under the Act shall subject as therein mentioned be invested or otherwise applied wholly in one or partly in one and partly in another or others of the following modes: then follow 21 so-called modes, of which the first is "investment in Government securities, or in other securities in which the trustees of the settlement are by the settlement or by law authorized to invest trust money of the settlement, with power to vary the investment into or for any other such securities" and the others are the numerous forms of application which experience had shown to be necessary or expedient. So far there is nothing to indicate with whom the direction or initiative lies. This is to be found in section 75, which provides by subsection (1) that: "Capital money arising under this Act shall, in order to its being invested or applied as aforesaid, be paid either to the trustees of the settlement or into court at the option of the tenant for life, and shall be invested or applied by the trustees, or under the direction of the court, as the case may be, accordingly." At this stage the tenant for life, having exercised his option for payment to the trustees or into court, appears to leave the scene. But subsection (2) provides that: "The investment or other application by the trustees shall be made according to the direction of the tenant for life, and in default thereof according to the discretion of the trustees . . . and any investment shall be in the names or under the control of the trustees"; subsection (3) provides that: "The investment or other application under the direction of the court shall be made on the application of the tenant for life, or of the trustees"; and subsection (4) that: "Any investment or other application shall not during the subsistence of the beneficial interest of the tenant for life be altered without his consent." I do not think that any assistance is to be had

from subsection (5) or subsection (6), but subsection (7) provides that: "Those securities," [i.e., the securities representing capital money] "may be converted into money, which shall be "capital money arising under this Act." By definition "capital "money arising under this Act," unless the context otherwise requires, means "capital money arising under the powers and "provisions of this Act or the Acts replaced by this Act, and "receivable for the trusts and purposes of the settlement and "includes securities representing capital money" (section 117 (1) (ii)).

On these sections the contention of the Crown is that the tenant for life, having under section 75 (2) directed the application of capital money in the mode first mentioned, viz., in investment in authorized securities, has no power to direct a change of investment into other authorized securities, that the power to vary rests with the trustees and that, though under subsection (4) of section 75 they cannot exercise that power without the consent of the tenant for life, he has no power of direction. On the other hand it is argued that, just as the tenant for life has the initial power of direction and the further power (which is not denied) of directing that investments shall be realized and the proceeds applied in some authorized mode of application, e.g., in discharge of incumbrances, so he has power to direct that an investment shall be realized and the proceeds shall be invested in other investments, or, in other words that the words "with "power to vary" which occur in section 73 (1) (i) do not confer a power on the trustees apart from the tenant for life but merely indicate that the right of the tenant for life to direct is not exhausted when he has directed that the mode of application of capital money shall be the investment in securities.

My Lords, between these two views, both of which are, I think, possible, I choose the latter without hesitation. It would be at once illogical and inconsistent with the scheme of the Settled Land Act to give to the tenant for life the right to say whether capital money should be applied in investment in securities or (say) in the discharge of incumbrances (section 73 (1) (ii)), or in the purchase of land in fee simple (section 73 (1) (xi)), and the right too to direct the sale of securities and the application of the proceeds in some other mode, but to deny him the right to direct a variation of investment. It is not, I think, inconsistent with this view that section 75 (4) contemplates the consent of the tenant for life, which presupposes action initiated by the trustees; for under section 75 (2) the trustees may in

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default of direction by the tenant for life act at their own discretion and section 75 (4) is apt to cover such a case. Nor can I disregard section 75 (7). If securities can be converted into money (which I take to be something that can and must be done at the discretion of the tenant for life) the proceeds become capital money of which the tenant for life can direct the application and, if he directs the investment in securities, he can choose the securities so long as they are authorized. I am therefore of opinion that a tenant for life can direct an exchange of investments, assuming always that he acts within and according to his statutory or extended powers, and, coming from the general to the particular, I am of opinion that Lord St. Levan was competent to give the direction, to which I have referred, in regard to the investments forming part of the settled property. Accordingly the ratification and appointment by himself and Mr. Ponsonby added nothing to his direction. It was that which was effective and it was given by him in a fiduciary capacity.

The same point was raised also in regard to a third class of property which was transferred to the company, namely, the property which has been called "the equitable interests." What I have already said covers this class of property also, and I do not think it necessary further to explain why this property too was transferred to the company by Lord St. Levan in a fiduciary capacity.

So far, my Lords, I have endeavoured to interpret and apply section 46 of the Act to the facts of this case with only an oblique glance at section 58. But now I must turn to the contentions of the Crown which are based on that section and first to a contention based on subsection (5). That subsection provides that: "References in this Part of this Act to a person having any power or control or doing any act in a fiduciary capacity shall be construed as references to his having that power or control or doing that act in a fiduciary capacity imposed on him otherwise than by a disposition made by him and in such a capacity only."

It was urged on behalf of the Crown that, inasmuch as the additional powers by the exercise of which Lord St. Levan, as tenant for life, was enabled to transfer or direct the transfer of property to the company, owed their existence to a disposition made by him, namely, the deed poll of March 23, therefore the fiduciary capacity in which he exercised those powers was imposed on him by that disposition. I do not think that this argument is valid. Admittedly he was a trustee of the powers and therefore

could only exercise them in a fiduciary capacity, but this flowed from the provisions of section 107 of the Settled Land Act, 1925. It was Lord St. Levan who created the power but the capacity in which he exercised it was imposed by the Act. Take any settlement that you will and suppose that the tenant for life exercises a power conferred on him by the settlement in extension of his powers under the Settled Land Act. Whether the settlement is made by himself or another, it could not be said that the fiduciary capacity, in which he exercised the power, was "imposed" by the settlement. The word "impose" is, I think, apt to describe a consequence which flows from a statutory provision but inapt to describe a power voluntarily created.

The next contention that I must notice is founded on section 58 (2), which must be read in conjunction with section 58 (4). Subsection (2) provides that: "A person shall be deemed for the purposes of this Part of this Act to have made a transfer of property to a company if the property came to be included in the resources of the company by the effect of a disposition made by him or with his consent or of any associated operations of which such a disposition formed one." The argument here is that it was by the effect of a disposition made by Lord St. Levan in a non-fiduciary capacity, namely, the deed poll of March 23, or at least by the effect of associated operations, of which that disposition formed one, that the property came to be included in the resources of the company and that therefore Lord St. Levan must be deemed to have transferred the property to the company within section 46 and to have done so in a non-fiduciary capacity.

Here it is regrettably necessary to make further distinctions, for there were, as I have already pointed out, different species of property, and they demand separate consideration. First, it was urged that the cash paid by Lord St. Levan for the preference shares was caught by the subsection. I have already expressed the view, which is, I understand, held by the majority of your Lordships, that section 46 does not cover a cash subscription for shares. If this is so, it is, I think, impossible to say that the cash is "property included in the resources of the company" which anyone is deemed to have transferred. The transaction is outside the purview of the section and the subsection.

Next, the argument turned to the land. This was a kind of property which was in fact and in law transferred by Lord St. Levan himself to the company. The sale and the conveyance were made by him as tenant for life and were therefore made by him in a fiduciary capacity. I see no room for what I may call

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a deeming provision when that which is to be deemed has effectively taken place without it. Lord St. Levan transferred the property in a fiduciary capacity: the subsection does not in my opinion entitle me to deem him to have transferred it in a non-fiduciary capacity.

Next, and more difficult, come two other kinds of property which I can take together, the investments representing capital moneys and the equitable interests, and I must now turn to section 58 (4). This subsection, so far as relevant, provides as follows: "References in this Part of this Act to a disposition's "being made by any person . . . or to any other act's being done "by any person, include references to its being made . . . or "being done by him and another jointly or by another at his "direction. . . ." I have already expressed the opinion and will assume that it was competent for Lord St. Levan as tenant for life to direct the trustees of the settlement to invest capital moneys in the purchase of or in exchange for shares of the company, and that the effect of the deed of March 25 was that he validly exercised that power of direction with the result already pointed out that the confirmatory direction by him and Mr. Ponsonby in exercise of the overriding power added nothing to it. If so, the act of the trustees in transferring the investments was an act done by another at his direction, and accordingly it was, under this subsection, his act: it was he who transferred the property, and ex concessis he transferred it in a fiduciary capacity, for he was acting in exercise of additional Settled Land Act powers. But here comes the crux. If subsection (2) stood alone, and subsection (4) had not been enacted, I could not avoid the conclusion that Lord St. Levan must be "deemed" to have transferred the investments. The deeming provision would not (as it was in the case of the land) be excluded by an actual transfer, and, even though the direction to transfer was given in a fiduciary capacity, that could not alter the fact that the property became included in the resources of the company not as in the case of the land by an actual transfer by Lord St. Levan, but by a series of operations of which the exercise of the non-fiduciary overriding power was one. But subsection (2) does not stand alone and the question is what part subsection (4) is to play. The latter like the former is in effect a deeming provision. Am I, then, to say that as the result of subsection (4) Lord St. Levan was for the purposes of section 46 the actual transferor of the investments, just as he was of the land, so as to exclude the operation of the deeming provision of subsection (2)? Or am I

to say that subsection (4) is to be denied any operation where subsection (2) would without it be brought into play? It may be urged that as subsection (2) expressly does, but subsection (4) does not refer to transfers, the former section should apply. But this is a very tenuous thread on which to hang a taxpayer, for subsection (4) does not the less apply to transfers because it uses general words such as "disposition" and "act," which cover both transfers and other operations. I have come after much hesitation to the conclusion that the provision of subsection (4) must prevail. It is, I think, a subsection which is intended and is apt to cover every case: its language is absolutely general: it does not open as it might by a saving reference to subsection (2), and it should not be restricted unless it is necessary to do so in order to give some meaning to that subsection. But this clearly is not necessary; for subsection (2) has in any case ample scope where no question arises as to the capacity, fiduciary or non-fiduciary, in which a transfer is made but the question is whether that which was done, by whomsoever done, amounted to transfer.

My Lords, having come to the conclusion that Lord St. Levan did not transfer any property to the company within the meaning of section 46 except in a fiduciary capacity, I am of opinion that on this ground the alternative claim for duty which is made against the company fails and the cross-appeal of the Crown must be dismissed. But in case your Lordships take a different view on this very difficult question, it is right that I should state my opinion on the further question whether any and what benefit within the meaning of the section accrued to Lord St. Levan from the company in the three years ending with his death.

That some benefit so accrued to him is admitted by the company, for he received the proper instalments of the sum of £750,000 which were payable within those years and he also received dividends on the preference shares. But a dispute has arisen in regard to certain sums received by Lord St. Levan from the company in the circumstances which I must now state.

By a mortgage deed dated January 30, 1933, and made between Lord St. Levan of the one part and the company of the other part, the company covenanted to advance to Lord St. Levan on every March 25, June 24, September 29 and December 25, during the joint lives of Lord St. Levan and his nephew Francis Cecil St. Aubyn (now the third Baron St. Levan) at 4 per cent. interest a sum of £500 unless and until Lord St. Levan should give notice to the company that he did not require such advance to be made, and it was thereby agreed that payment of the said

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sums and of the interest thereon should not be required by the company until the expiration of a period of two years from the death of Lord St. Levan unless he or his personal representatives should desire to repay the same previously, and in the meantime interest becoming due thereon should be added to the principal money and carry interest accordingly, and the said deed contained a provision for deduction of the said debt by instalments from any instalment of the said sum of £750,000 remaining outstanding at the expiration of the period of two years and for charging the same upon such instalments.

By another like deed dated August 4, 1936, the company covenanted to advance to Lord St. Levan on every January 1 and July 1 during the same joint lives a further sum of £500 upon the same terms as the advances to be made under the said deed of January 30, 1933. Pursuant to the said deeds the company advanced to Lord St. Levan in each of the three years preceding his death sums amounting in all to £3,000, all of which with the interest thereon remained due and owing at his death.

The question is whether the advances so made were "benefits" within the meaning of section 46. The argument for the Crown is a simple one. Under section 47 (which I have already cited) any periodical payment out of the resources of the company is to be "treated as a benefit"; the loans or advances were payments made to Lord St. Levan out of the resources of the company and they were made periodically, and they were received by Lord St. Levan for his own benefit directly or indirectly. Therefore they were "benefits." The company, on the other hand, appeals once more to the plain use of ordinary words and denies that a man can fairly be said to receive for his own benefit a sum which he receives by way of loan and has to repay, and further relies on the omission of loan from a definition which refers to payment by way of dividend or interest or by way of remuneration or any other payment. The latter argument may derive some force from the contention of the Crown that a transaction of loan was just what the section was aimed at. But perhaps that contention had only become common form by the time this stage of the case had been reached. My Lords, here again is a question on which I find it impossible to express a confident opinion. It is indeed strange that no reference is made to a transaction of loan, and the result of holding such a transaction to be a benefit must, as learned counsel for the Crown was constrained to admit, have strange results. But I have come to the conclusion, nevertheless, that the contention of the Crown must be upheld. I cannot

escape from the fact that as each periodical loan was made to Lord St. Levan there was a payment to and receipt by him. And I cannot think that he received it any the less for his own benefit because he had, or his estate had, at a later date to repay it. He had the beneficial use of what he received and can fairly be said to have received it for his own benefit. I may add that I do not find it possible to find in the definition of periodical payment any genus of payments created from which, by the application of the ejusdem generis rule, a loan could be excluded, nor can I obtain any assistance from the provisions of Sch. VII to the Act, to which reference was made.

I am therefore of opinion that the loans were "benefits" within section 46. But this is only relevant if Lord St. Levan transferred property to the company within the same section except in a fiduciary capacity, and this, in my opinion, he did not.

It follows from what I have said that in my opinion the appeal should be allowed with costs and the cross-appeal dismissed with costs and the judgment of Croom-Johnson J. restored.

My Lords, my noble and learned friend LORD OAKSEY, who is unable to be here today, has asked me to say that he concurs at all points in the opinion which I have just delivered.

LORD NORMAND. My Lords, I have had the advantage of reading the opinions of my noble and learned friends Lord Simonds and Lord Radcliffe, and I am in agreement with them at all points where they are at one. It will, therefore, be possible for me to deal with the case without trespassing for long on your Lordships' patience.

On the Crown's claim under sections 43 and 56 of the Finance Act, 1940, I can state my view quite briefly. After the death of Lord Amherst on March 7, 1927, there was vested in Lord St. Levan and Mr. Ponsonby a joint power of appointment over all the property comprised in the settlement, which they were free to exercise for the personal benefit of Lord St. Levan. Mr. Ponsonby was not a trustee in relation to that power, and Lord St. Levan was the effective dominus of the settled property. He also had the powers of a tenant for life under the Settled Land Act, 1925. His powers, derived from one or the other of these sources, enabled him to bring about an enlargement of the powers of investment and a realization and reinvestment of the settled property, to appropriate to himself in fee the whole or any part of the property or of substituted investments of the proceeds, and to make a gift or settlement of such part as he did not appropriate

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in favour of persons selected by him. By his exercise of these powers, the original settled property, the lands, equitable interests and investments, were sold to the company, part of the price was invested in the ordinary shares of the company and the balance was appropriated by Lord St. Levan, who also resettled the ordinary shares in trust in such a way as to extinguish his life interest and to exclude himself from all further interest in them. In substance and in form, therefore, he took part of the trust property as his own absolutely, and made a gift of what remained under trust to donees selected by himself. Admittedly the trustees for the donees immediately assumed bona fide possession and enjoyment of the ordinary shares of the company. These shares were an item of property separate from the part of the purchase price which had not been invested in them, and which was represented by the preference shares of the company and a *jus crediti* in a balance payable by the company, both owned by Lord St. Levan. If Lord St. Levan had been the holder of debentures and preference and ordinary shares in the company and had transferred the ordinary shares, whether by gift or for value, the transferee thenceforth would have retained possession and enjoyment of the ordinary shares to the entire exclusion of Lord St. Levan and of any benefit to him by contract or otherwise. The present case is in no way different from that and the effect of the transactions is that the possession and enjoyment of the ordinary shares by the trustees were retained by them to the entire exclusion of Lord St. Levan and of every benefit to him by contract or otherwise.

The application of the statutory hypothesis as provided for by section 56 can in this respect make no difference. The fictional mutation of the company into a trust and of the company's creditors and shareholders into beneficiaries, however far it is carried, still leaves the beneficial rights representing the ordinary shares and the beneficial rights representing the preference shares and the instalments separate items of property; and the beneficial rights representing the ordinary shares are, when the statutory hypothesis is applied, still enjoyed by the donees thereof to the entire exclusion of Lord St. Levan and of any benefit to him.

On the case law of this branch of the appeal I need say nothing, since it has been fully dealt with by my noble and learned friends.

The Crown's cross-appeal and claim under section 46 and the sections which have to be read with it, as set out in the opinion of my noble and learned friend Lord Simonds, raise questions of

some difficulty. The first point is whether Lord St. Levan, when he paid £100,000 for the preference shares in the company, made a transfer of property within the meaning of section 46. My opinion is that "transfer of property" are not the usual words which would be naturally selected to describe a payment of money, though it cannot be denied that money is property or that payment is a transfer. I think that if it had been intended to strike at money payments the simple words necessary to make that intention clear would have been added.

The next question is whether Lord St. Levan made a transfer to the company of the lands, equitable interests and investments which formed the original settled property otherwise than in a fiduciary capacity (section 46 (1)). The precise wording of the subsection is of importance. If the question had been whether Lord St. Levan transferred the lands, to take the clearest case, otherwise than in a fiduciary capacity, the answer might well have been that he did not. For it was he who transferred the lands by the conveyance of March 26, 1927, and he did so in pursuance of the fiduciary power imposed on a tenant for life by the Settled Land Act, 1925. It could then have been argued with some plausibility that the inquiry was complete, and that there was neither necessity nor justification for pursuing it further by recourse to a provision under which a person may be deemed to have made a transfer of property.

But when the inquiry is whether Lord St. Levan made a transfer of the lands, the answer may be different. I find it impossible to read section 46 and the related sections without being forced to recognize that the same party may make more than one transfer within their meaning, and that the making of one such transfer otherwise than in a fiduciary character satisfies pro tanto the conditions for charging the company's assets under section 46. It is no answer that the same party made another transfer in a fiduciary capacity.

Now, by the appointment of March 23, 1927, Lord St. Levan made a disposition, as defined in section 59, by the effect of which the lands, equitable interests and investments, came to be included in the resources of the company and therefore he must be deemed to have made a transfer of the property to the company (section 58 (2)). Admittedly this transfer was not made in a fiduciary capacity. A further disposition was necessary to complete the transfer of the property to the company. But I think that the whole trust property came to be included in the company's resources by the effect of the appointment of March 23,

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Lastly, I see no way of escaping the conclusion that the advances made under the deeds of January 30, 1933, and August 4, 1936, were periodical payments and therefore benefits within the meaning of section 47, despite the arbitrary results and crude anomalies to which such a conclusion may lead.

For these reasons I would concur in my noble and learned friend Lord Radcliffe's proposals for disposing of the appeal and cross-appeal.

LORD RADCLIFFE. My Lords, the original appeal relates to the Crown's claim to estate duty under section 43 of the Finance Act, 1940, that claim being assisted or encumbered by the provisions of section 56 of the same Act. It is no doubt convenient to dispose of the questions which are involved in that appeal before going on to deal with the cross-appeal of the Crown.

No one could suppose that section 43 is anything but an obscure section. So was section 11 of the Finance Act, 1900, the statutory parent of the present enactment. So were section 35 and section 39 of the Finance Act, 1930, which extended the scope, without elucidating the meaning, of the charge imposed by the Act of 1900. All these sections have now disappeared and their place is taken by section 43 and the accompanying provisions of the Finance Act, 1940. But there still appears as a condition on which freedom from duty depends that difficult phrase about bona fide possession and enjoyment of the property being assumed and "thenceforward retained to the entire exclusion of the person who had the interest and of any benefit to him by contract or otherwise." There was very general uncertainty as to what, if not all, benefits were intended to be covered by these words, and as to the circumstances in which, if there were indeed any circumstances, a person might legitimately be found in the enjoyment of some contractual benefit after the termination of the limited interest without involving the property in continuing liability for duty. I think it regrettable that when, in 1940, opportunity was found to wipe out the old sections and to enact a new set of provisions, opportunity was not at the same time found to make those provisions more readily intelligible. I can appreciate that at any rate some of the transactions with which section 43 and section 56 appear to be concerned are deplorable from the point of view of those interested in revenue collection, but for all that, the taxpayer is

entitled to be told with some reasonable certainty in what circumstances and under what conditions liability to tax is incurred or else to be told explicitly that the circumstances and conditions of liability are just those which the Commissioners of Inland Revenue in their administrative discretion may consider appropriate. The seventeen sections which constitute Part IV of the Finance Act, 1940, are expressed with what proves on investigation to be a vagueness so diffuse and so ambiguous that they may well produce in practice the second alternative while adopting in form the requirements of the first. This would be an unfortunate situation to have brought about. The prayer of Ajax—'Ἐν δὲ Φάει καὶ ἄλυσσον—has been heard before in your Lordships' House, but I think its appeal is even stronger when obscurity is created by deliberate legislation than when it arises from the less wilful confusions of the common law.

My Lords, I have formed the opinion that the fate of this appeal must turn on the meaning that you attribute to the phrase which appears in subsection (2) (a) of section 43:—"if bona fide possession and enjoyment of the property in which the interest subsisted was assumed immediately thereafter by the person becoming entitled by virtue of or upon the disposition or determination and thenceforward retained to the entire exclusion of the person who had the interest and of any benefit to him by contract or otherwise." For the facts of this case, complicated as they may seem, come down to a simple legal issue. Those facts have been fully stated in the opinion of my noble and learned friend, Lord Simonds, and it is quite unnecessary for me to travel through them again. What it comes down to is this: The Crown's claim is for estate duty on the ordinary shares of St. Aubyn Estates Ltd. Those shares constitute the property in which the deceased had a life interest at the date when he and Mr. Ponsonby executed the deed poll of March 29, 1927; and it is because that deed had the effect of determining his life interest in that property that the Crown prefers its claim under section 43. So far there is nothing in controversy. The appellants, however, maintain that on March 29, the deceased was immediately and thereafter continued to be excluded from any possession or enjoyment of those ordinary shares, since the whole beneficial interest in them belonged to others than himself, and that the possession and enjoyment so taken by or on behalf of those others was such as to exclude him from any benefit by contract or otherwise. This is where the whole controversy comes. For the Crown, while not disputing that after the deed

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of March 29 the whole beneficial interest in the ordinary shares belonged to others than the deceased, contends that the existence of those interests of which he had become the absolute owner by virtue of the deed of March 28, 1927, made it impossible to say that the possession and enjoyment of the ordinary shares which had been assumed by or on behalf of those others was retained to the entire exclusion of any benefit to the deceased by contract or otherwise.

At first sight it is difficult to see any basis for this contention. No right or interest that was left to Lord St. Levan after March 29 interfered with the new owners' full possession and enjoyment of that "bundle of rights" which constituted the ordinary shares and which formed the property in which he had given up his life interest. It is true that, putting aside his ownership of the preference shares, he continued to enjoy the benefit of the company's contract to pay such part of the purchase price as was to be discharged by half-yearly instalments of £18,750 each. Certainly this was a benefit by contract; certainly the right to receive this money in this way had been created as one step in the series of transactions which began with the deed of March 23 and ended with the deed of March 29, 1927. Moreover, I do not think it necessary to treat it as less than certain that Lord St. Levan and Mr. Ponsonby, the joint authors of all that was brought about at that time, intended from the first that the benefit of this contract, when created, should become the absolute property of Lord St. Levan and that the ordinary shares should be resigned to follow the trusts declared by their deed of March 29 to the exclusion of any further interest of Lord St. Levan in those shares. But unless it is a valid proposition of law that for the purposes of section 43 bona fide possession and enjoyment of property is not assumed and retained to the entire exclusion of any benefit to a person by contract or otherwise merely because it is found that after releasing a limited interest in the property that person continues to enjoy a contractual benefit created as part of the whole scheme in which that release is involved, I do not see that the recital of the facts that I have set out above brings the Crown any nearer to establishing its case under section 43. I am afraid that there is a good deal that is yet to be said on this appeal; but in substance the case for the Crown stands or falls by that proposition. If it is right, the wording of the section is indeed inapt to express its meaning; for to adopt it requires no more than to ascertain whether the deceased was left in possession of any contractual benefit at all at

the end of the transaction and gives no significance to the question whether that benefit, whatever it is, is such as to trench upon the possession and enjoyment of the property in which the interest has been surrendered. My own view is that the whole proposition is fallacious. Nor do I think it the better founded if the qualification is introduced that a benefit by contract, to be within the mischief of the section, must be "referable to" the transaction by which the life interest is determined. Your Lordships were invited to accept that qualification because the words in question had been used by Lord Tomlin when delivering the opinion of the Judicial Committee in *Munro v. Commissioner of Stamp Duties*.²⁴ But there is a difference between using words to explain a point and using words to define a proposition; and the words "referable to" are in themselves of too ambiguous an import to afford any satisfactory gloss upon the meaning of the section.

There is this much, and not more than this much, to be said for the proposition advanced by the Crown. It was decided long ago in *Attorney-General v. Worrall*,²⁵ that a contractual benefit may interfere with the exclusive possession and enjoyment required by such a provision (in that case section 11 (1) of the Customs and Inland Revenue Act, 1889) even though it does not amount to a reservation out of the property that is the subject of the gift. My Lords, so it may. For my part, I see nothing in the decision of *Worrall's* case²⁵ that cannot readily be accepted as good law. But what did it decide? A father had made a present to his son of a sum of about £24,000 secured on mortgage and the son had bought in the equity of redemption for a small sum; in return for his father's gift the son had covenanted to pay him an annuity of £735 per annum during his life. In effect the son was returning to the father the income on the property given during the remainder of the father's life. It seems to me reasonable enough for a court to hold in those circumstances that the son had not obtained the enjoyment of what was given free from a contractual benefit to the father which encumbered the enjoyment of the very thing that was given. To hold otherwise would have been to stop at the mere form of the transaction. Even if I did not think that *Worrall's* case²⁵ was rightly decided, as I do, I should not think it right at this date to suggest that it ought to be overruled. It has stood too long, and has been too

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²⁴ [1934] A.C. 61.²⁵ [1895] 1 Q.B. 99.

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often relied upon. But I think it a very mistaken form of reasoning to deduce from a decision that a benefit, to be within the mischief of the section, need not necessarily be by way of reservation out of the subject-matter of a gift the general proposition that all benefits are within the mischief of the section, whether they are by way of reservation out of the subject-matter of the gift or not. To deny the validity of one general proposition is not to assert the general validity of its opposite. I suggest, therefore, that your Lordships can safely put aside the case of *Attorney-General v. Worrall*²⁵ as having no further bearing on this appeal than that of showing that the benefit of the instalment payments which Lord St. Levan retained was not without the mischief of the section merely because the company's contract to pay them was neither a charge upon nor a reservation out of the property which consisted of the ordinary shares. But it leaves unresolved the essential question whether that benefit was nevertheless within the mischief of the section.

I do not believe that there is any great difficulty in answering that question. I think that in this, and in other cases arising on similar legislative provisions, there are two matters that have to be attended to before the answer can be given. The first is, How did the deceased come to be in enjoyment of that benefit by contract, the existence of which is said to compromise the possession and enjoyment of the property released? The second is, What precisely is the property the life or other interest in which has been determined? On the first point the answer is plain. The deceased enjoyed that contractual benefit because he decided to create it and to take it for himself. This is not a case in which he had to bargain to get what he wanted; nor is it a case in which by some ambiguous arrangement he took back in substance a part of that of which he had affected to dispose. The whole of this scheme was brought about by an exercise of the powers of the deceased alone or of the deceased in conjunction with Mr. Ponsonby. Between them they brought the company into being; created the instalment debt, the preference and the ordinary shares; secured that the instalment debt, the cash and the ordinary shares should become the property held on the trusts of the resettlement instead of the land, investments and other interests transferred to the company; and then withdrew the cash and the instalment debt to become the deceased's absolute property and put an end to any further interest of his in the ordinary shares. Nor can there be any doubt about the answer

²⁵ [1895] 1 Q.B. 99.

to the second point. It was the ordinary shares in which the life interest was determined; not the ordinary shares as they might have been had some scheme been operated other than that which was in fact adopted, but the ordinary shares as in fact they were, shares in a company which had acquired assets on the terms of paying for them in part by the satisfaction of this instalment debt.

Now, if that was the situation, the possession and enjoyment of the rights which constituted the ordinary shares were only affected by the existence of the instalment debt in the sense that the half-yearly payment of the instalments reduced the resources which, had there been no debt, would have been available for the benefit of the shareholders of the company. But I think that there is formidable authority against the view that in such a situation the possession and enjoyment of the relevant property is not exclusive of a benefit to the donor or releasor of such property. A man may have an arrangement which gives him contractual benefits that affect an estate and may subsequently make a gift of his interest in that estate; if he does the donee has possession and enjoyment of what is given, to the entire exclusion of the donor or of any benefit to him. That is the *Munro* case.²⁶ Shares may be made the subject of a trust for another person, the maker of the trust having the right under it to be one of the trustees, to retain in his control the voting-power in respect of the shares and to take an ultimate resulting interest; yet that benefit does not bring the property within the mischief of a similar provision. That is *Commissioner of Stamp Duties for New South Wales v. Perpetual Trustee Co. Ltd.*²⁷ No more is possession and enjoyment of a gift compromised if a man vests property in trustees upon trust to provide out of it certain limited benefits for a donee, but subject thereto upon trust for himself. That is *In re Cochrane*.²⁸ All these decisions proceed upon a common principle, namely, that it is the possession and enjoyment of the actual property given that has to be taken account of, and that if that property is, as it may be, a limited equitable interest or an equitable interest distinct from another such interest which is not given or an interest in property subject to an interest that is retained, it is of no consequence for this purpose that the retained interest remains in the beneficial enjoyment of the person who provides the gift.

My Lords, I think that the application of that principle is sufficient to destroy the Crown's claim under section 43. In

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²⁶ [1934] A.C. 61.²⁷ [1943] A.C. 425.²⁸ [1905] 2 I.R. 626; [1906] 2 I.R.

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substance the position of Lord St. Levan was the position of a man who creates a rentcharge in his own favour upon property which is in his absolute disposition and then makes a gift of that property subject to that charge. Nothing is then given except the interest so charged. Is possession and enjoyment of what is given exclusive of the donor or of any benefit to him, despite his continued receipt of the amounts secured by his charge? I conclude that it is, for I cannot imagine that, had the law been otherwise, the case of *Grey v. Attorney-General*,²⁹ would have taken the course that it did. In that case Earl Grey had at least created a rentcharge for himself on parting with his estates; but I think that the judgments in the Court of Appeal make it plain that it was not because he had done that, but because he had done and secured for himself so much more than that, that liability for duty attached. The explanation of that decision which was offered by the Irish Court of Appeal in *In re Cochrane*,³⁰ makes it turn upon the existence of the covenants which the transferor had secured for himself by the transaction and which left him still the effective master of all that he had transferred, and the reasoning of Lord Russell in the *Perpetual Trustee* case³¹ seems to me to be directed to making the same point. I agree with those views, and I cannot more aptly conclude my opinion on this part of the appeal than by quoting what Lord Russell there says on this point³¹: “ . . . the entire “ exclusion of the donor from possession and enjoyment which “ is contemplated . . . is entire exclusion from possession and “ enjoyment of the beneficial interest in property which has “ been given by the gift, and . . . possession and enjoyment by “ the donor of some beneficial interest therein which he has not “ included in the gift is not inconsistent with the entire exclusion “ from possession and enjoyment which the subsection requires.”

Hitherto I have made no reference to section 56. I have not done so because, in face of the considerations which I regard as the determining considerations in this matter and which I have tried to set before your Lordships, I do not see what difference it makes whether section 56 (2) is applied or not. But, since it was the existence of this section that caused the Court of Appeal to decide the appeal in favour of the Crown, a decision to which, I gather, they would not have come had section 43 been unfortified by section 56, I must state briefly why it is that I do not regard that section as having any importance in this case. It

²⁹ [1898] 2 Q.B. 534; [1900] A.C. 124.

³⁰ [1906] 2 I.R. 200.

³¹ [1943] A.C. 425, 446.

introduces what has been called "the statutory hypothesis"; but it introduces that hypothesis for a limited purpose only. The property on which estate duty is claimed remains the same: the ordinary shares. The property in which the life interest has been determined remains the same: the ordinary shares. It is only when the further question arises under section 43 (2) (a) whether possession and enjoyment of that property has been assumed and retained to the exclusion of the releasor and of any benefit to him that the statutory hypothesis comes in to test the exclusion by asking whether, even if it has been completely achieved in circumstances as they are, it would have been equally true to say that it was achieved if the company had been trustee of its property to give effect to equitable rights analogous to those in fact created by the shares and "debentures" of the company. If the answer would have been No in the imaginary state of things postulated by the hypothesis, then the protection of section 43 (2) (a) cannot be invoked by the taxpayer.

Of course this is a clumsy device. It is impossible to say with any precision what are the equitable rights which ought to be thought of as analogous to the existing rights represented by shares and "debentures." It is particularly difficult in the case of shares, for the section throws no light on the extent to which one is supposed to retain or to discard the managerial powers to which the rights of ordinary and other shareholders are subject but which they may ultimately control. But I do not think that it is necessary for the present purpose to investigate these details or to try to resolve them. It can certainly be accepted that on the assumptions required by the hypothesis the company holds all its assets as a trust fund upon trust in the first place to make thereout the payments to Lord St. Levan required by the instalment debt, subject thereto to make such payments to the preference shareholders as may correspond to the rights that they would have as preference shareholders, and subject thereto upon such trusts for the ordinary shareholders as may correspond to their share rights, but not so as to prejudice or destroy the prior equitable rights. Thus there is one trust fund and different sets of equitable rights to be satisfied out of that fund. Thus, too, the imaginary situation on March 29, 1927, was that Lord St. Levan had the equitable rights in that trust fund corresponding to the preference shares and the instalments and he had surrendered to those interested under the resettlement his life interest in the equitable rights in the trust fund corresponding to the ordinary shares.

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If it were enough for the Crown to succeed that it should be possible to point out that after March 29, Lord St. Levan continued to enjoy an interest in the same trust fund as was bound in equity to satisfy those other equitable rights in which he had determined his life interest, then section 56 would be very important in this case. I think that the Court of Appeal held that it was enough. Here I part company with them, and the sentence that I have already quoted from Lord Russell's opinion in the *Perpetual Trustee* case³² as a summary of existing authority shows why I do. In brief, I do not think that turning the instalments into one kind of equitable right in property and the preference and ordinary shares into other kinds of equitable rights in property, as the statutory hypothesis does, makes them any the less distinguishable interests or properties than they were in their actual non-hypothetical form.

I must now come to the Crown's cross-appeal under section 46. It raises three principal questions. The first is whether Lord St. Levan "made a transfer" of any property to St. Aubyn Estates Ltd. The second is, whether, if he did, that was property which he "transferred in a fiduciary capacity." The third is whether, if he did make a transfer of some property and did not make that transfer in a fiduciary capacity only, any "benefits" accrued to him from the company within the three years ending with his death. It is perhaps sufficient to say, since at this stage we are dealing with matters of principle only, that if the first question is answered in the affirmative, the second in the negative and the third in the affirmative, section 46 has imposed a charge of estate duty, payable by the company and arising on the death of Lord St. Levan.

The first question requires that your Lordships should consider the manner in which three separate classes of property came to be included in the resources of the company:—the freehold lands; the investments representing capital moneys and the equitable interests and rights in respect of undivided shares of land, these interests and rights being considered as one class with the investments for the present purpose; and thirdly, the moneys paid on the subscription of Lord St. Levan's 100,000 preference shares. It is convenient to deal first with the investments in relation both to the first and to the second questions, since the consideration of their case raises most of the difficulties of interpretation that affect the others and one at least that is peculiar to themselves.

³² [1943] A.C. 425.

If the word "transfer" is taken in its primary sense, a person makes a transfer of property to another person if he does the act or executes the instrument which divests him of the property and at the same time vests it in that other person. In this sense the only persons who made a transfer of the investments to the company were Mr. Drummond and Mr. Ponsonby, the trustees of the St. Levan resettlement. If section 46 stood alone that would, I think, conclude the matter. Lord St. Levan would not have made this transfer. But section 58 imposes various interpretations of the language of the preceding sections. to which interpretations effect must be given; and, as I see it, it is in applying those interpretations and in discerning the true inter-relation between them that the first major difficulty is encountered. For, in one way or another, they do certainly constitute Lord St. Levan a transferor.

To begin with, there is section 58 (2). There is more than one reason why it should be considered before section 58 (4). It comes the earlier in the section. It deals explicitly with the subject of "transfer," which subsection (4) does not. And, since it refers to a disposition being made by a person, it incorporates within its own provisions all the extended or artificial meanings of that phrase which subsection (4) itself lays down. Now subsection (2) is concerned to declare what persons are to be "deemed" to have made a transfer of property to a company. It identifies them, rather unhappily, not so much by what they have done as by the results of what they or other persons have done. The word "deemed" is used a great deal in modern legislation. Sometimes it is used to impose for the purposes of a statute an artificial construction of a word or phrase that would not otherwise prevail. Sometimes it is used to put beyond doubt a particular construction that might otherwise be uncertain. Sometimes it is used to give a comprehensive description that includes what is obvious, what is uncertain and what is, in the ordinary sense, impossible. I think that it is in the last of these three ways that it is used in section 58 (2), for the subsection begins its description of the class of persons who are to be deemed to have made a transfer with the person the effect of whose own disposition has been to add the property transferred to the resources of the company, and ends with the person who has done no more than make a disposition which is "associated" with operations that have had a similar result.

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If I apply to Lord St. Levan this statutory conception of a transferor I find this consequence. The investments were transferred to the company at his direction, for he so directed as tenant for life when he and Mr. Ponsonby jointly executed the deed of appointment dated March 25, 1927. It will save time in this very long opinion if I say that I accept the company's argument that under the Settled Land Act, 1925, he had power to direct the trustees of the resettlement to change the investments that represented capital moneys, and that this power had to be exercised by him in a fiduciary manner. I have had an opportunity of reading in advance the opinion of my noble and learned friend Lord Simonds and I am in full agreement with what he says on this point. By virtue of this operation, then, Lord St. Levan is deemed to have made a transfer of those investments to the company, for they came to be included in the resources of the company "by the effect of" a disposition made at his direction, and this by subsection (4) is the same thing as a disposition made by him. But that is not the only way in which section 58 (2) requires that he must be deemed to have made a transfer, for it was the execution of the deed of appointment dated March 23, 1927, made by him and Mr. Ponsonby that alone made possible the transfer of the investments to the company in the manner in which and for the consideration for which they were in fact transferred. This deed, which was the first step in the whole scheme, was a disposition which formed one of a series of associated operations of which the actual transfer of the investments was another; and on this ground also, therefore, I think that the Crown is entitled to treat Lord St. Levan as a person who made a transfer to the company.

There remain two points that have to be disposed of before an answer can be given to the problems which are raised by section 46. One is this: if the supposititious transfer by Lord St. Levan which arises by virtue of the fact that he directed the transfer of the investments is exempted from recognition for the purposes of section 46 by the further supposition that he made such a transfer in a fiduciary capacity, does this prevent Lord St. Levan from being treated as having made a transfer by virtue of the appointment dated March 23, 1927? On no view can that act be said to have been done in a fiduciary capacity. My Lords, I can only say that I can see no reason why, if one way of looking at the position involves no liability, that should prevent it being looked at in another way that does involve liability. A provision that is drawn in the form of section 58 (2) brings it about that

quite different acts may independently of each other constitute a person a transferor on the occasion of a single transfer. If they do, the alternative is this: either the subject is entitled to select that act the circumstances of which suit his interest best as leading to exemption from or reduction of duty and to insist that the Crown's claim succeed or fail by consideration of those circumstances, or the Crown is entitled to found upon either or both of the acts and to succeed if its claim is good by either test. I think that the latter is the right alternative, for I think that it accords with what are in effect the cumulative provisions of section 58 (2), and that an option of this sort is not unusual in taxing statutes. In my opinion, therefore, Lord St. Levan did make a transfer of the investments to the company for the purposes of section 46, because he and Mr. Ponsonby executed the appointment dated March 23, 1927.

The second question is whether, in so far as he was a transferor by virtue of having given a direction as tenant for life for the change of investment that led to the investments representing capital moneys being exchanged for ordinary shares of the company, he made that supposititious transfer "in a fiduciary capacity" within the meaning of section 46. That he acted in a fiduciary capacity I have already accepted; and, though the Act is wholly obscure on this point, I think that when a person is a supposititious transferor by virtue of a supposititious transfer, the act, whatever it may be, that makes him subject to the supposition must itself be treated as a transfer in order to see whether the supposititious transfer was made "in a fiduciary capacity" or not. The effect of section 58 (5) is to impose a special meaning on the words "fiduciary capacity": it must be a fiduciary capacity imposed on the actor otherwise than by a disposition made by him and no other sort of capacity. I have felt some doubt whether the circumstance that Lord St. Levan created the power of investment by making the appointment of March 23, 1927, did not result in the fiduciary capacity in which he gave his direction being imposed by a disposition made by him. But your Lordships, I believe, are unanimous in rejecting this construction of section 58 (5), and it is with something less than regret that I waive my doubts in the matter and accept the view that in giving the direction Lord St. Levan made a supposititious transfer in a fiduciary capacity only and that, regarded in this way, his transfer is exempted from recognition under section 46. But, as I have already said, I think that he was a supposititious transferor of the

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So much for the investments; and it was conceded that the equitable interests in undivided shares of land are for this purpose governed by the same considerations as apply to the investments. So I think that those too were transferred by Lord St. Levan. Then there is the settled land. Its situation is different from that of the investments in that Lord St. Levan was himself the conveying party and therefore made a transfer to the company in the ordinary sense. This he was in a position to do because the freehold in fee simple had been vested in him by the operation of the Settled Land Act, 1925, to hold the same upon trust to give effect to the equitable interests from time to time subsisting under the settlement. He sold the land as tenant for life and transferred as trustee to give effect to the sale that he had made; and in this case I do not think that he could possibly be said to have imposed the fiduciary capacity in which he transferred by any disposition made by himself, for in fact the resettlement of 1879 neither vested in him an estate in fee simple nor gave him a power of sale. It was the Act of 1925 that both transferred the fee simple to him and enacted that he should hold it as a trustee. Therefore when he came to transfer it he acted in a fiduciary capacity imposed upon him otherwise than by a disposition made by himself. But for section 58 (2) that would be enough to exempt the transfer of the settled land from the operation of section 46. That subsection, however, raises the same difficulty as I have discussed in relation to the investments. If it were no more than a provision supplementary to section 46, in the sense that it was so drawn as to apply only to cases which section 46 did not cover by its own terms, it might be proper to ignore it in a case where, as here, section 46 did, in the natural and ordinary sense of "transfer", apply. But, as I have said, I do not think that section 58 (2) can be regarded in this way. It applies directly to Lord St. Levan, for the settled land came to be included in the resources of the company by the effect of his conveyance. It applies to him also in the extended sense, for the transfer that he made was one of a series of associated operations of which the appointment dated March 23, 1927, was one: without that appointment that transfer could never have been made, as it was, for a consideration consisting in part of payment by instalments. Here again, therefore, Lord St. Levan can be treated as a transferor in two distinct ways, one, as actual transferor but in a fiduciary capacity, the other, as supposititious

transferor but acting, as such, not in a fiduciary capacity. Here again I think that the Crown is entitled to choose whichever way of presenting the matter under section 58 (2) may better suit its case, and, accordingly, I think that there was a transfer of the settled land also for the purposes of section 46.

Lastly, there is the £100,000 which Lord St. Levan paid as his subscription for the preference shares. My Lords, I must say quite briefly that in my opinion, when he did this, he made a transfer of £100,000 to the company within the meaning of this statute. Certainly the company got £100,000 as part of their resources: first a cheque, then a credit with Messrs. Glyn, Mills & Co. Certainly Lord St. Levan by giving the cheque which led to the transfer of bank credit reduced his own credit by an equivalent amount. I have spoken of Lord St. Levan as having given a cheque for £100,000, for I assume that he must have. In any event he must have given some authority to the bankers to debit his account with £100,000 and to credit the company with a like amount, and that is, I think, sufficient for the purpose. Whatever form the authority took, it was a disposition made by him and it was an essential part of the transaction by which the company's resources were augmented by this £100,000. I am bound to say that in that state of affairs Lord St. Levan seems to me plainly to have made a transfer of £100,000 to the company for the purposes of section 46 as interpreted by section 58 (2).

One question remains upon which I must express my opinion. It only arises if your Lordships should consider, as I do, that one or more items of property were transferred by Lord St. Levan within the meaning of section 46. During the three years preceding his death he received from the company sums amounting in the aggregate to £3,000 in each year by way of loan. These loans carried interest at the rate of 4 per cent. per annum, but the company could not call for repayment of either principal or interest until the expiration of two years after Lord St. Levan's death. Were the sums so received "benefits" accruing to him from the company within the meaning of section 46?

I would answer this question by saying that they were benefits because section 47 of the Act has declared them so to be. That section does in terms declare that among the things to be treated as benefits accruing to a deceased transferor from a company are any periodical payments out of the resources of the company which the deceased received for his own benefit. A man receives for his own benefit moneys paid to him on an advance by way of loan, not the less because the transaction involves an obligation to

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repay an equivalent amount at a future date with interest in the meantime. A "periodical payment" is defined by section 47 (2) in terms which give it the widest possible scope and show at any rate that a payment may be a benefit by way of periodical payment even though it is made in consideration of services rendered or by way of interest on money lent.

I can appreciate the force of several criticisms if loans are treated as benefits for this purpose. To have money advanced to one is, no doubt, a benefit; but to treat the whole sum advanced as itself the benefit seems a curious procedure. Yet the statute makes no provision for any valuation of the benefit, since it treats the payment itself as being the benefit. The procedure becomes the more curious when it is discovered that a payment made in respect of a loan without interest is treated as equivalent to other payments made in respect of loans at normal interest, high interest or even exorbitant interest. A loan made within the statutory period and repaid before death is treated as equivalent to a loan still outstanding. I appreciate the force of these criticisms, as I do of other criticisms that might be levelled at the width of the definition of "periodical payments." But I am unable to find in the wording of the Act any warrant for allowing them to cut down what seems to me the arbitrary interpretation that is deliberately imposed upon us. It is not as if these criticisms depended on obscure or complicated considerations. They are fairly obvious, and I think that the only possible conclusion is that the legislature, intending to prescribe for a branch of enterprise that may often involve what are at least highly artificial operations, decided to impose its charge in the widest and most comprehensive terms; a decision which excludes the more normal distinctions between what is reasonable and what is unreasonable and the usual connotations of the English language.

For these reasons I would be in favour of allowing the cross-appeal of the Crown and of making a declaration to the effect that for the purposes of section 46 Lord St. Levan made a transfer of (a) the investments and the equitable interests in undivided shares of land; (b) the settled freeholds; and (c) the £100,000 paid as subscription for the preference shares, and a further declaration that the moneys advanced to him on loan during the statutory period are benefits within the meaning of the same section.

LORD TUCKER. My Lords, I have nothing to add to what has already been said in stating my agreement with the view which is

held by all your Lordships that for the reasons which have been given the appeal in the present case should be allowed.

With regard to the cross-appeal and dealing first with the investments and equitable interests, I have formed the view—accepting as I do that Lord St. Levan as tenant for life had power under the Settled Land Act, 1925, to direct a change of investment of the capital moneys—that by the joint effect of section 58 (2) and section 58 (4) of the Finance Act, 1940, he must be deemed to have made a transfer, but I think that such transfer was made by him in a fiduciary capacity, because the act which results in the notional transfer was done in a fiduciary capacity, so that the resulting transfer must be regarded as having been made in that capacity. It was, moreover, in my view a fiduciary capacity imposed upon him solely by the provisions of the Settled Land Act, 1925.

But Lord St. Levan must, I think, also be deemed to have made a transfer of the investments by reason of the deed of appointment of March 23, 1927, made by him and Mr. Ponsonby, without which the subsequent direction and transfer could not have been given and made. In executing this deed he was clearly not acting in a fiduciary capacity and this act on his part was accordingly sufficient to bring it within section 58 (2). I agree with the view that if one operation which is within subsection (2) was performed in a fiduciary capacity and another operation within the subsection in a non-fiduciary capacity the taxpayer cannot avoid the consequence that the second operation becomes by the “deeming” process a transfer within section 46 (1). My Lords, I do not deal in greater detail with this aspect of the case, as I am content to say that the reasoning of my noble and learned friend Lord Radcliffe on the inter-relation of subsections (2) and (4) of section 58 and the results that follow therefrom appear to me convincing.

When, however, I come to apply these subsections to the transfer of the lands the position seems to me wholly different. Here Lord St. Levan was himself the conveying party. He was, I think, for the reasons which have been stated, acting in a fiduciary capacity imposed on him by the Settled Land Act and in such capacity only. Like my noble and learned friend on the woolsack I can see no ground for calling in aid a “deeming” section when that which is to be deemed has in fact taken place without its assistance. If the notional transfer is to supersede the real transfer with consequences detrimental to the taxpayer this should, I think, be made plain by unambiguous language.

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As to the £100,000 paid for the preference shares, I agree that to refer to money paid by way of subscription for shares as a transfer of property to the company is an unusual use of words, none the less, not without some doubt, I have come to the conclusion that the words in their present context are wide enough to include payment in cash or by cheque. It must be remembered that the companies referred to are only those to which the section applies and that one of the commonest ways in which benefits of the kind enumerated in section 47 are obtained is as a result of payment of money. Furthermore, section 58 (2) once again requires consideration and, although it does not elucidate the meaning of the word property, it would be odd if a sum of money which "comes to be included in the resources of the "company" is not property. Some support for this view is, I think, also to be obtained from section 51.

My Lords, I am accordingly of opinion that there have been transfers of property within the meaning of section 46 which are not exempted by the terms of that section in the case of the investments and equitable interests and in the case of the £100,000 paid for the preference shares, but that the transfer of the lands is exempted. With regard to the benefits accruing to the deceased from the company, I agree that the sums amounting to £3,000 advanced to Lord St. Levan during the three years preceding his death were benefits which accrued to him from the company. I feel considerable doubt whether they come within the definition of periodical payments in section 47 (2), a definition which on the Crown's construction would include loans which had been repaid at the date of death, but I do not regard section 47 as containing an exhaustive definition of the word "benefits" but merely as enumerating certain matters which are "to be "treated as benefits." It does not, I think, exclude other transactions, such as the present, which in the circumstances of particular cases may clearly confer benefits on the deceased in the natural and ordinary meaning of that word.

I would accordingly allow both appeal and cross-appeal.

Appeal and cross-appeal allowed.

Solicitors: Dawson & Co.; Solicitor of Inland Revenue.

[HOUSE OF LORDS.]

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MOODIE	APPELLANT;	1951 June 6, 8, 11, 12; July 25.
AND		
HOSEGOOD	RESPONDENT.	

Landlord and Tenant—Rent restriction—Death of contractual tenant intestate—Tenancy vested in “the Probate judge”—Claim of widow of contractual tenant to remain in possession as statutory tenant—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 Geo. 5, c. 17), s. 12 (1) (g).

By section 12 (1) (g) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, as amended by section 1 of the Act of 1935, “the expression ‘tenant’ includes the widow of a “tenant who was residing with ~~him~~ at the time of his death.” The words include the widow of a contractual, as well as a statutory, tenant, and accordingly enable her to claim the protection of the Rent Restriction Acts by virtue of section 3 of the Act of 1933.

Thynne v. Salmon [1948] 1 K.B. 482 and *Smith v. Mather* [1948] 2 K.B. 212 overruled.

Decision of the Court of Appeal (sub nom. *Hosegood v. Moodie*) [1950] W.N. 112 reversed.

APPEAL from the Court of Appeal (Somervell, Singleton and Denning L.JJ.).

From November, 1937, until the date of his death intestate on May 20, 1950, William Andrew Moodie occupied a dwelling-house known as St. Anne’s Lodge, Headley Road, Grayshott, Hampshire, as the tenant of the Misses Figgis-Smith at a weekly rent of 15s., the dwelling-house being one to which the Rent Restriction Acts applied. The appellant was his widow, residing at the house with him at the time of his death, and she continued to reside there after his death. On his death the contractual tenancy vested in the Probate judge under section 9 of the Administration of Estates Act, 1925.

On June 22, 1950, the respondent acquired the freehold of the house by purchase from the then landlords and on June 30, 1950, he served on the Probate judge a notice in writing to quit it at the end of the next complete week of the tenancy after the date of the notice. It was not disputed that the effect of that notice was to determine the tenancy.

* *Present*: LORD PORTER, LORD MORTON OF HENRYTON, LORD REID, LORD TUCKER and LORD ASQUITH OF BISHOPSTONE.

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On October 3, 1950, the respondent issued a plaint in the Farnham county court against the appellant, claiming possession of the house and certain mesne profits. By her defence the appellant alleged that she was in lawful possession of the house, as the widow of the late William Moodie, under the Increase of Rent and Mortgage Interest Restrictions Act, 1920, s. 12 (1) (g), as amended. The county court judge made an order for possession and the Court of Appeal affirmed his decision. The appellant appealed to the House of Lords.

Diplock K.C. and *E. H. P. Wrightson* for the appellant. On the true construction of the words “‘tenant’ includes the ‘widow of a tenant who was residing with him at the time of ‘his death’” in section 12 (1) (g) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, as amended, the widow of a contractual tenant is included as well as the widow of a statutory tenant. In this there is nothing unreasonable or contrary to the conceptions of law and there is nothing in the other Rent Restriction Acts to compel the words to be read in a sense narrower than their *prima facie* and natural meaning, nor is there a context which “otherwise requires.” Whereas section 12 (1) (f) refers to a person deriving title by assignment or otherwise from the original tenant, section 12 (1) (g) refers to a person who does not so derive title because the original tenant either cannot assign (since he dies intestate or has no assignable title) or does not assign, even though he dies testate. Since the widow of the contractual tenant is included, section 3 (1) of the Act of 1933 protects her possession as her husband was tenant of the house up to his death and she was his widow then residing with him. There is no difficulty in applying the subsection to her.

Until 1948 it was assumed that the widow of a contractual tenant was in English law included in the expression. This was the construction put on the subsection by the Court of Appeal of Northern Ireland in *Apsley v. Barr*,¹ and by the courts in Scotland since 1926: see *Joint Properties Ltd. v. Williamson*.² These decisions were correct. The same construction was put on the section by the courts in England until 1948: it is expedient that all courts should put the same construction on the section. The law laid down in *Thynne v. Salmon*,³ and in *Smith v. Mather*⁴ which followed from its reasoning, is wrong and has caused great

¹ [1928] N.I. 183.² 1945 S.C. 68, 71-2.³ [1948] 1 K.B. 482.⁴ [1948] 2 K.B. 212.

injustice. The result of these and of *Harrison v. Hopkins*⁵ is that on the death of a contractual tenant intestate a race takes place between the landlord to serve notice to quit on the Probate judge and the widow to obtain letters of administration before the notice to quit expires, since then being in actual physical possession of the premises she is entitled to the protection of the Rent Restriction Acts as deriving title under the original tenant. See also *Mellows v. Low*.⁶

The antecedents of the relevant provision are as follows. In the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915, section 2 (1) (d) provides that tenant includes "any person" "from time to time deriving title under the original landlord." There was no provision corresponding to section 12 (1) (g), nor was the widow protected. The position remained unchanged under the Acts of 1918 and 1919. In the Act of 1920, section 12 (1) (g) appeared in substantially the same form as it exists at present, save that it referred to the widow of a tenant "dying intestate." Since a statutory tenant cannot bequeath his interest by will, reference to a tenant "dying intestate" would be completely inapt if only a statutory tenant were meant and the provision did not apply to a contractual tenant; the effect would have been singularly capricious and would penalise a statutory tenant for making a will. By the time the Rent Restriction Acts were dealt with by the Act of 1933 the legislature must have appreciated that the statutory tenant had no interest which he could bequeath by will: *John Lovibond & Sons Ltd. v. Vincent*⁷ and *Keeves v. Dean*.⁸ Yet in that Act, which by section 13 amended section 12 (1) (g) in some respects, the legislature did not remove the words "dying intestate." Had this matter come up for decision between 1933 and 1935 it could not have been decided as it was in *Thynne v. Salmon*.⁹ It was only by section 1 of the Act of 1935 that the words were removed.

It is easy to apply to the widow who retains possession the provisions of section 15 of the Act of 1920 dealing with the conditions of a statutory tenancy. There is nothing in section 15 (1) which compels the court to say that despite the prima facie meaning of the word "tenant" in section 3 of the Act of 1933 it must be given a more restricted meaning or which on the appellant's argument would give rise to any conception contrary to law. The fact that one can imagine circumstances which

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⁵ [1950] 1 K.B. 124.⁶ [1923] 1 K.B. 522.⁷ [1929] 1 K.B. 687.⁸ [1924] 1 K.B. 685.⁹ [1948] 1 K.B. 482.

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could give rise to difficulties is not a sufficient reason for placing a restricted meaning on the relevant words. One must distinguish between the presence of difficulties (which is inevitable) and cases where a result is produced which would be contrary to all legal conceptions. In this case the appellant puts forward a conception of the position of the widow which is rational and consistent with the ordinary view of legal relations. When the contractual tenancy is brought to an end, as here, the legal personal representative disappears from the scene for the purposes of the statutory tenancy and the obligations of the widow are owed to the person who, apart from the Act, would be entitled to possession, the direct landlord. The legal personal representative is entitled to the protection of the Acts in a case where he is actually residing together with the widow in the house at the time of the death: see *Lawrance v. Hartwell*.¹⁰ In the case of an administrator in whom the estate of the deceased vests on the statutory trusts for sale, there is ground for saying that the widow's rights under the Rent Restriction Acts should prevail.

E. H. P. Wrightson following. The Rent Restriction Acts do not alter ordinary common law rights or the laws of probate. They only alter the landlord's contractual position, the enforceability of his right to possession. Their object is the protection of the home: see *Skinner v. Geary*.¹¹ Their idea is to protect the homes of poor people who often would not make wills. The object of the Act of 1935 was to widen the class of persons protected. Before that Act section 12 (1) (g) afforded protection to the widow both in the case of the statutory tenant and of the contractual tenant who died intestate; since 1935 all the cases referred to in para. (g) are covered. In some sections of the Rent Restriction Acts the word "tenant" means a contractual tenant; in others it means a statutory tenant, and in others it means either contractual or statutory tenant. Section 12 is the definition section of the Acts; therefore the word "tenant" therein must include all the meanings in the substantive sections. As regards the position of the Probate judge, under section 9 of the Administration of Estates Act, 1925, no beneficial interest in the property of the intestate vests in him: see *Dyke v. Walford*.¹² Under the Rent Restriction Acts "tenant," so far as the protective clauses are concerned, means only a tenant in possession. There can therefore be no conflicting tenancies. If

¹⁰ [1946] K.B. 553.¹² (1846) 5 Moo.P.C. 434.¹¹ [1931] 2 K.B. 546.

the widow is in possession no one can remove her provided she satisfies the conditions of the Acts. Her right is valid against the estate in whomsoever it may vest at whatever time.

Heathcote-Williams K.C. and *Horner* for the respondent. The decisions in *Thynne v. Salmon*¹³ and *Smith v. Mather*¹⁴ are correct. The contention that until 1948 it was generally assumed that section 12 (1) (g) embraced the widow of a contractual tenant is not borne out by the textbooks: see *Sophian on the Rent Restrictions Acts* (1933 ed.), p. 57. See also *Rent and Mortgage Restrictions: Law Notes*; *Safford's Rent and Mortgage Interest Restrictions Acts, 1920 to 1939*; and *Blundell's Rent Restrictions Guide*. On the true construction of section 12 (1) (g) the expression "tenant" is restricted to the widow of a statutory tenant, and on the true construction of section 12 (1) (f) the expression "tenant" therein refers only to the original contractual tenant and persons who derive title from him while his estate under the original contract of tenancy exists, and cannot refer to a statutory tenant, as no one can derive title from a statutory tenant. Thus the two provisions are complementary.

As to the history of the contractual position under a tenancy see the *Statute of Gloucester, 1278*; *Potter's Historical Introduction to English Law*, pp. 494, 500; *Holdsworth's History of English Law*, vol. III, pp. 213-4; *Roe v. Russell*,¹⁵ and *Oliver Wendell Holmes on The Common Law*, pp. 260-1.

It is no part of the scheme of the Rent Restriction Acts to provide for the creation, termination or disposition of a contractual tenancy. The legislature and the courts have been careful not to affect the interests of contractual tenants save in the matter of restricting the recoverable rent and of the court's jurisdiction to make an order granting possession. The appellant's construction would interfere with contractual tenancies and so cannot be right. Two conditions must be fulfilled before a statutory tenancy can arise: (a) there must have been a contractual tenancy, and (b) the contractual tenancy must have come to an end. This is implicit in section 15 (1) of the Act of 1920, which provides the conditions of a statutory tenancy. As to the terms included in it see *Megarry on the Rent Acts* (6th ed.), p. 164.

To construe section 12 (1) (g) as including a contractual tenant and as having the effect of making his widow the statutory tenant

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¹³ [1948] 1 K.B. 482.¹⁵ [1928] 2 K.B. 117, 134.¹⁴ [1948] 2 K.B. 212.

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when his tenancy, vested on his death in some person other than the widow, was determined would be inconsistent with the intention of the paragraph that the tenancy thereby created should take effect from the date of the death of the deceased tenant and also with the decisions in *Lawrance v. Hartwell*¹⁶ and *Harrison v. Hopkins*¹⁷ that the executrix or administratrix of a deceased contractual tenant living with him at the dwelling-house in question at the determination of the contractual tenancy thereupon at that date becomes the statutory tenant. If the Act had intended, despite the contractual tenancy in someone else, a statutory tenancy to be created in favour of the widow it would have said so. In the construction of the paragraph in question one must avoid difficulties which are fundamental to the law of landlord and tenant and the whole scheme of the Acts. The respondent's construction does not detract from anything which the tenant could leave to his widow at his death.

When the Act of 1935 amended section 12 (1) (g) by deleting from the phrase "the expression 'tenant' includes the widow of "a tenant dying intestate" the last two words thereof, the widow of a contractual tenant was not deprived of any protection which but for that amendment she would have enjoyed, nor did the amendment introduce difficulties for contractual tenants. Neither before nor after the amendment was a statutory tenant able to dispose of his statutory tenancy by will, and the amendment merely removed the anomaly that the widow of a statutory tenant could not herself become the statutory tenant under section 12 (1) (g) if her husband died testate. It is possible that the draftsman of the Act of 1920 did not then appreciate that a statutory tenant had no interest which he could bequeath by will.

[They referred to *John Lovibond & Sons Ltd. v. Vincent*¹⁸; *Keeves v. Dean*¹⁹; *Oxley v. Regional Properties Ltd.*²⁰ (reversed on other grounds in *Regional Properties Ltd. v. Oxley*²¹); *Hewitt v. Rowlands*²²; and *Thynne v. Salmon*.²³]

Horner following. As to the position of the Probate judge, in this case the contractual tenant having died intestate, his estate, including his tenancy, vested on his death in the judge under section 9 of the Administration of Estates Act, 1925: see *Mortimer on Probate* (2nd ed.), p. 759. Previously, when an intestate's property vested in the Ordinary his power derived as

¹⁶ [1946] K.B. 553.¹⁷ [1950] 1 K.B. 124.¹⁸ [1929] 1 K.B. 687, 692, 694.¹⁹ [1924] 1 K.B. 685, 697.²⁰ (1944) 60 T.L.R. 519, 520.²¹ [1945] A.C. 347.²² (1924) 93 L.J.K.B. 1080, 1082.²³ [1948] 1 K.B. 482, 487.

follows: In the case of intestacy all personal estate originally vested in the Crown, though the distribution would be to the nearest relatives: see Williams on Executors (12th ed.), vol. I, pp. 270-1. It was thought that the Ordinary (usually the bishop of the diocese in which the deceased died) who had had the care and charge of his soul all his life was the best person to discharge this duty, and so to him the Crown entrusted it. He had no beneficial interest but complete power of administration and disposal. At first the disposal was in pious uses after the wife and children had had reasonable shares. This was without paying the debts of the deceased. The statute 13 Edw. I, c. 19, rectified this, and thereafter the Ordinary had to pay those debts. The statute 31 Edw III, stat. 1, c. 11, is the origin of administrations as we know them today, the intestate's next friends being deputed to administer his goods and having an action to recover as executors the debts due to him as well as being answerable to those to whom the intestate was bound in the same manner as executors; they were accountable to the Ordinary as executors, being his officers appointed by him. By the Court of Probate Act, 1857, the jurisdiction was transferred to the Court of Probate. Now it resides in the Probate judge, and the estate vests in him as it vested in the Ordinary, who had full power to administer and dispose as the judge has today, though in practice he would appoint an administrator should any question arise: see *Fred Long & Son Ltd. v. Burgess*.²⁴ In these circumstances the Probate judge who has the lease vested in him, as it would have vested in the Ordinary, would, if necessary, administer and distribute by having an administrator appointed, and this might well be a son of the intestate living in the premises. There is no reason why the Probate judge should not be liable for rent, which is the same thing as a debt. He could disclaim by getting an administrator appointed. If no one was willing to act he could find some official in the Treasury Solicitor's office. In any event, he could not be liable for more than was in the estate.

Diplock K.C. in reply. As to the position of the Probate judge see *Mackley v. Nutting*.²⁵

This is a case of a weekly tenancy where the only interest which could vest in the administrator is an interest in a term terminable at a week's notice. The effect of the decision in *Thynne v. Salmon* ²⁶ in a typical case of a working-class house is that if the tenancy is determined by the landlord before the

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²⁴ [1950] 1 K.B. 115, 118.²⁶ [1948] 1 K.B. 482.²⁵ [1949] 2 K.B. 55.

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tenant dies the widow is completely protected, whereas if it has not been so determined and the landlord serves notice to quit on the Probate judge before letters of administration have been taken out the widow has no protection. Before that decision there was a large body of opinion which took a view favourable to the appellant's contention: see *Summers v. Donohue*.²⁷ A construction should be given to this provision which gives effect to the policy of allowing widows to stay in the houses where they have lived. It is not the case that the Rent Restriction Acts are not intended to interfere with the rights under contractual tenancies. The Acts constantly expressly interfere with contractual relations: see sections 1, 6 and 16 (2) of the Act of 1920.

As to the definition of "tenant" in section 12 (1) (g), only by an extension of meaning can the word include someone, such as a statutory tenant, who has neither a term of years nor a periodic tenancy. Prima facie the definition includes the widow of a contractual tenant. As to section 3 (1) of the Act of 1933, it is not dealing with a right of action for trespass in general, nor with the right of a person in de facto possession to retain possession against all the world save the person with the legal title. It is only dealing with the right of the person who fulfils the definition of "tenant" under the Acts to retain possession against the person in whom the legal title would otherwise vest. Section 3 has no application to a landlord who is seeking possession against a tenant for breach of the tenancy agreement. Its effect in the present connexion is that where a tenant leaves a widow residing with him at the time of his death she cannot be deprived of possession.

As to the liability of a personal representative for rent, see the Trustee Act, 1925, s. 26.

Their Lordships took time for consideration.

July 25. LORD PORTER. My Lords, in this case I have had an opportunity of reading the opinion about to be expressed by my noble and learned friend, Lord Morton of Henryton. As I find myself in complete agreement with both his reasoning and the result, I have not thought it necessary to add to the opinions to be expressed.

LORD MORTON OF HENRYTON. My Lords, this appeal involves yet another consideration by your Lordships' House of the

²⁷ [1945] K.B. 376.

provisions of the Rent and Mortgage Interest (Restrictions) Acts, 1920–1939, hereafter referred to as “the Acts.”

The appellant is the widow of Mr. William Andrew Moodie, who died intestate on May 20, 1950. From November, 1937, until the date of his death Mr. Moodie occupied a dwelling-house known as Saint Anne’s Lodge, Headley Road, Grayshott, in the county of Hants, as the tenant of the Misses Figgis-Smith at a weekly rent of 15s. That dwelling-house was one to which the Acts applied. Accordingly, if the tenancy had been determined by notice in Mr. Moodie’s lifetime, he would have ceased to be a contractual tenant and would have become what is commonly called a “statutory tenant.” I shall use that convenient phrase to describe a person who is entitled to the protection given by the Acts, bearing in mind, however, that such a person is not a tenant in the ordinary meaning of that word, since he has no existing contract of tenancy and has no right at common law to retain possession.

On the death of Mr. Moodie intestate, his contractual tenancy vested in the Probate judge under section 9 of the Administration of Estates Act, 1925. On June 22, 1950, the respondent acquired the freehold of Saint Anne’s Lodge by purchase from the Misses Figgis-Smith, and on June 30, 1950, he served on the Probate judge a notice in writing to quit the said property at the end of the next complete week of the tenancy after the date of the notice. It is not disputed that the effect of that notice was to determine the tenancy.

The appellant was residing at Saint Anne’s Lodge with her husband at the time of his death, and she continued to reside there after her husband’s death. On October 3, 1950, the respondent issued a plaint in the Farnham county court against the appellant claiming possession of the house and certain mesne profits. By her defence the appellant alleged that she was in lawful possession of the house, as the widow of Mr. Moodie. This defence was based on certain provisions of the Acts which must now be set out.

Section 12 (1) of the Act of 1920, as amended, provides, so far as material, as follows:—“For the purposes of this Act, except “where the context otherwise requires:— . . . (f) the expressions “‘landlord,’ ‘tenant,’ ‘mortgagee,’ and ‘mortgagor’ include “any person from time to time deriving title under the original “landlord, tenant, mortgagee or mortgagor; (g) the expression “‘landlord’ also includes in relation to any dwelling-house any “person, other than the tenant, who is or would but for this Act

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Section 3 (1) of the Act of 1933, which replaced, with certain amendments, section 5 (1) of the Act of 1920, provides that: “No order or judgment for the recovery of possession of any dwelling-house to which the principal Acts apply or for the ejection of a tenant therefrom shall be made or given unless” certain conditions there specified are complied with. It is common ground that these conditions have not been complied with in the present case.

The arguments of the parties to this appeal can now be summarized. The appellant contends as follows: Section 3 of the Act of 1933 protects the possession of a tenant. Section 12 (1) (g) of the Act of 1920, as amended, provides that, unless the context otherwise requires, the expression “tenant” includes the widow of a tenant who was residing with him at the time of his death. There is no context which “otherwise requires” in this case. My husband was the tenant of St. Anne’s Lodge up to the time of his death. I am his widow and I was residing with him at the time of his death. Therefore I am a “tenant” within section 3 of the Act of 1933 and my possession is protected by that section.

To this contention the respondent replies that the appellant is not “the widow of a tenant” within the meaning of section 12 (1) (g) because the word “tenant” occurring in that phrase refers only to a “statutory tenant” and has no application to a contractual tenant.

Thus the decision of this appeal turns entirely upon the meaning of the word “tenant” in the phrase just quoted. Does it mean, or at least include, a contractual tenant, or does it refer only to a statutory tenant?

My Lords, it is plain that if the word “tenant” is to be given its ordinary meaning in the phrase “widow of a tenant,” the appellant must succeed; but the county court judge and the Court of Appeal have held that the word “tenant” in this phrase neither means nor includes a contractual tenant. In so holding both the learned judge and the Court of Appeal followed the decisions in *Thynne v. Salmon*²⁸ and *Smith v. Mather*,²⁹ but Denning L.J., while agreeing that these decisions covered the

²⁸ [1948] 1 K.B. 482.²⁹ [1948] 2 K.B. 212.

point in dispute, made some observations which I have found most helpful. The cases of *Thynne v. Salmon*²⁸ and *Smith v. Mather*²⁹ will shortly be considered, but I shall first point out that there are strong reasons why the word "tenant" in the phrase in question should be construed as including a contractual tenant. In the first place, any other construction involves a departure from the ordinary meaning of the word. In the second place, it would be capricious in the extreme to extend the protection of the Acts to a widow whose husband's contract of tenancy had been determined in his lifetime, and to withhold it from a widow whose husband's contract of tenancy was still subsisting at his death. Finally, it is noteworthy that section 12 (1) (g) of the Act of 1920, in its original form, enacted that "the expression 'tenant' includes the widow of a tenant dying intestate," etc. A statutory tenant could never bequeath his so-called tenancy by will; therefore, the reference to a tenant "dying intestate" would be wholly inappropriate if the word "tenant" meant only a statutory tenant. It has been suggested that the draftsman may not have appreciated in 1920 that a statutory tenant had no interest which he could bequeath by will, but this point had been made abundantly clear before 1933. See, for instance, *Keeves v. Dean*³⁰ and *John Lovibond & Sons Ltd. v. Vincent*.³¹ Thus, when the Act of 1933 was passed, it was clear that the words "dying intestate" were appropriate only in the case of a contractual tenant. Yet these words were retained, although section 12 (1) (g) was amended in another respect. If the question now under consideration had come before the courts between 1933 and 1935, I find it difficult to imagine that the decision would have been against the widow. The last stage in the history of section 12 (1) (g) is the Act of 1935. The words "dying intestate" were struck out by that Act, but it is surely plain that this was done with the intention of widening the scope of the subsection and not of narrowing its scope. If the widow of a contractual tenant was protected prior to 1935, it can hardly be imagined that Parliament intended to take away this protection by striking out the words "dying intestate."

For these reasons, in the absence of authority I should have had no doubt that the word "tenant" in the relevant passage included a contractual tenant, and prior to the decision of the Court of Appeal in *Thynne v. Salmon*³² it appears to have been

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assumed that this was so. See, as to England, *Summers v. Donohue*³³; as to Scotland, *Joint Properties Ltd. v. Williamson*,³⁴ when the point was conceded; as to Northern Ireland, *Apsley v. Barr*,³⁵ where the only question argued was whether the widow had lost on remarriage the right which she admittedly possessed prior to the happening of that event.

It is convenient at this point to set out section 15 (1) of the Act of 1920, as the decision of the Court of Appeal in *Thynne v. Salmon*³⁶ was based entirely on that subsection: "A tenant who by virtue of the provisions of this Act retains possession of any dwelling-house to which this Act applies shall, so long as he retains possession, observe and be entitled to the benefit of all the terms and conditions of the original contract of tenancy, so far as the same are consistent with the provisions of this Act, and shall be entitled to give up possession of the dwelling-house only on giving such notice as would have been required under the original contract of tenancy, or, if no notice would have been so required, on giving not less than three months' notice: Provided that, notwithstanding anything in the contract of tenancy, a landlord who obtains an order or judgment for the recovery of possession of the dwelling-house or for the ejectment of a tenant retaining possession as aforesaid shall not be required to give any notice to quit to the tenant."

In *Thynne v. Salmon*³⁶ the facts were that one E. A. Salmon was the monthly tenant of a cottage which came within the scope of the Rent Restriction Acts. On June 2, 1946, Salmon died intestate, and letters of administration were taken out by his sister, Mrs. Annie Lush, on July 30, 1946. On October 4, 1946, notice to quit, expiring on November 5, 1946, was served on that sister as administratrix. She had at no time been in occupation of the premises, and was not residing with her brother at the date of his death. The defendant, another sister of the deceased, was residing with him at the date of his death and had been so residing from the beginning of the tenancy. She continued in occupation of the premises after his death and was in occupation when the proceedings for possession were begun. No other member of the deceased's family was residing with him at the date of his death. The administratrix had done nothing to create any tenancy as between herself and her sister, the defendant, after the grant of letters of administration. The county court

³³ [1945] K.B. 376.³⁴ 1945 S.C. 68.³⁵ [1928] N.I. 183.³⁶ [1948] 1 K.B. 482.

judge made an order for possession, and the defendant appealed. At the hearing her counsel said ³⁷: "It is no part of the sub-mission for the defendant that there were two concurrent tenancies here. The defendant became entitled as a statutory tenant the moment the contractual tenancy came to an end." The majority of the Court of Appeal felt it impossible to hold either that the "statutory tenancy" of the defendant arose when the contractual tenancy terminated, or that two co-existing tenancies arose on the intestate's death, a "statutory tenancy" of the defendant and the contractual tenancy which vested in Mrs. Lush as the legal personal representative of the intestate. Tucker L.J. (as he then was), with whose judgment Roxburgh J. agreed, said in the course of his judgment ³⁸: "Whether para. (g) may apply in the case of a contractual tenant on whose death no executor or administrator is ever appointed, it is not necessary to decide. It is in my view sufficient to say that it cannot apply where the tenancy vested in a contractual tenant at his death has passed by will or on an intestacy to some person other than his widow or member of his family residing with him at the time of his death, but that it clearly does apply where the deceased tenant was a 'statutory tenant' unable to transmit his statutory interest." Bucknill L.J., in a dissenting judgment said ³⁹: "I do not see any sufficient reason for saying that para. (g) only applies in cases where the tenant was a statutory tenant at the time of his death and does not apply in cases where the tenant was a contractual tenant at the time of his death."

The question left open by Tucker L.J. in *Thynne v. Salmon* ⁴⁰ came before the Court of Appeal for decision in *Smith v. Mather*.⁴¹ In that case the contractual tenant of a house within the Acts died intestate. Her son and daughter were living with her at her death. No letters of administration having been taken out, the estate vested in the Probate judge upon whom the landlords served notice duly terminating the contractual tenancy. They then brought proceedings for possession against the deceased tenant's son and daughter. The Court of Appeal thought that the reasoning in *Thynne v. Salmon* ⁴⁰ applied to the facts just stated and consequently held that section 12 (1) (g) of the Act of 1920 had no application to the case.

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³⁷ [1948] 1 K.B. 482, 484.³⁸ Ibid. 489.³⁹ Ibid. 491.⁴⁰ [1948] 1 K.B. 482.⁴¹ [1948] 2 K.B. 212.

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My Lords, in my view the widow of a tenant, whether contractual or "statutory," who was residing with her husband at the date of his death is entitled to the protection given by the Acts. If a contractual tenancy is still subsisting at her husband's death, and devolves upon someone other than the widow, it is not destroyed, but the rights and obligations which would ordinarily devolve upon the successor in title of the contractual tenant are suspended, so long as the widow retains possession of the dwelling-house.

If the contractual tenancy is determinable by notice, the landlord or contractual tenant can determine it by giving the appropriate notice, but such determination will not affect the widow's rights and obligations under section 15, and if no notice is given the contractual tenancy will come into full operation when the widow gives up possession under section 15. If the contractual tenancy is a lease for years, it will remain in being, but so long as the widow remains in possession she, and not the contractual tenant, is bound to observe the terms and conditions of the lease and has the benefit thereof.

This, in my opinion, is the answer to the problem which confronted the Court of Appeal in *Thynne v. Salmon*.⁴² At no time are there two tenants, each one entitled to the benefit and subject to the burden of the contractual tenancy. The so-called statutory tenant is not a tenant in the true sense; he or she is merely a person who is given certain protection by the Acts and who must observe the terms of section 15 of the Act of 1920 so long as that protection continues. The position which thus arises involves, of course, a novel intrusion into contractual rights as they are known at common law, but the effect of the Acts as a whole is to bring into existence a being wholly unknown at common law, commonly called a statutory tenant, and the results which I have described seem to follow inevitably from the language of section 15 (1). That subsection contemplates that the statutory tenant—and by implication no one else—shall observe and be entitled to the benefit of all the terms and conditions of the original contract of tenancy, so far as they are consistent with the provisions of the Acts.

For these reasons I am of opinion that the cases of *Thynne v. Salmon*⁴² and *Smith v. Mather*⁴³ were wrongly decided, and I think that the decision in *Thynne v. Salmon*⁴² and consequently the decision in *Smith v. Mather*⁴³ might well have been different if the argument in the former case had followed a different course.

⁴² [1948] 1 K.B. 482.⁴³ [1948] 2 K.B. 212.

I would allow this appeal and order the respondent to pay the appellant's costs here and below. H. L. (E.)

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LORD REID. My Lords, I have had an opportunity of reading the speech of my noble and learned friend, Lord Morton of Henryton, and I agree with him.

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LORD TUCKER. My Lords, it is clear that unless there is some compelling reason to the contrary the "widow of a tenant" must include the widow of the person who was the contractual tenant of the premises in question at the date of his death. In *Thynne v. Salmon*⁴³ I expressed the view that in section 3 (1) of the Act of 1933 the word "tenant" could only apply to a so-called "statutory tenant" as otherwise there would exist on the death of the contractual tenant, leaving a widow residing with him at the date of his death, two "tenancies" in one and the same dwelling-house, one vested in his executor or in the Probate judge and the other a "statutory tenancy" vested by the Rent Restriction Acts in the widow. It therefore appeared to me that the legislature must have intended the protection afforded by the operation of section 3 of the Act of 1933 in conjunction with section 12 (1) of the Act of 1920 to apply only to the widow of a "statutory tenant." This result is not, I venture to think, as illogical as it appears at first sight, since the section which replaced section 5 (1) of the Act of 1920 was clearly designed to prevent the ejectment of tenants whose tenancies had expired or otherwise determined. "Contractual tenants" whose tenancies still subsisted needed no protection. Furthermore to deprive a tenant of the right to transmit the immediate benefit of his contract of tenancy by his will is a somewhat drastic step in the process of judicial statutory interpretation in the absence of clear and unambiguous language to that effect.

I am, however, satisfied on further consideration that the solution suggested by my noble and learned friend Lord Morton of Henryton, viz., that the contractual tenancy subsisting at the husband's death and devolving on some person other than the widow is not destroyed but merely suspended so long as the widow retains possession of the dwelling-house, is the real answer to the difficulties which would otherwise result from giving to the word "tenant" its natural and ordinary meaning. In the result I agree that the majority decision of the Court of Appeal in *Thynne*

⁴³ [1948] 2 K.B. 212.

H. L. (E.) v. *Salmon*,⁴⁴ to which I was a party, was erroneous and that the dissenting judgment of Bucknill L.J. should have prevailed. 1951 *Thynne v. Salmon*⁴⁴ and *Smith v. Mather*,⁴³ which followed MOODIE v. thereon, must I think be overruled and the present appeal HOSEGOOD. allowed.

LORD ASQUITH OF BISHOPSTONE. My Lords, I have had the advantage and pleasure of reading the opinion of my noble and learned friend, Lord Morton of Henryton, and I am in complete accord with it.

Appeal allowed.

Solicitors; *Jaques & Co.; Gibson & Weldon.*

⁴³ [1948] 2 K.B. 212.

⁴⁴ [1948] 1 K.B. 482.

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[AND CONNECTED APPEALS]

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

Company—Contract to allot shares—Breach—Specific performance—Measure of damages.

Where the appellant company was in breach of a contract to allot a specified number of its shares to the respondent, and an order for the specific performance of the contract was made, the damages to be awarded to the respondent in respect of the breach of contract were restricted to the equivalent of the dividends at the rates declared by the company between the date when the shares should have been allotted and the date of actual allotment, with interest on the dividends until payment.

CONSOLIDATED APPEALS (Nos. 33 to 39 of 1950) from a decree of the Supreme Court of Ceylon (July 9, 1948), which varied decrees of the District Court of Colombo (August 19, 1946).

The following facts are taken from the judgment of the Judicial Committee: The appellant company was incorporated on

* *Present*: LORD PORTER, LORD NORMAND, LORD OAKSEY and LORD RADCLIFFE.

November 24, 1942, and it was brought into being for the purpose of operating an exclusive road service under the Omnibus Service Licensing Ordinance, No. 47 of 1942, on the Colombo to Kandy road in the Island of Ceylon, though under the objects clause of its memorandum of association it was empowered to apply for licences to operate on other routes. Before that Ordinance was enacted owners of omnibuses obtained route licences, which frequently overlapped, so that several licensees were entitled to ply along the same route. That, as was stated in the judgment of the Supreme Court, sometimes resulted in unhealthy rivalry and competition between the licensees, and even led to breaches of the peace and to the commission of serious offences. It was to remedy that mischief that the Ordinance of 1942 was enacted. It provided (section 2 (1)) that no omnibus should on or after January 1, 1943, be used on any highway for the conveyance of passengers for fee or reward, except under the authority of a road service licence issued by the Commissioner of Motor Transport, and (section 7 (1)) that, subject to a proviso and to an exception which were not material, the issue of road service licences should be so regulated by the Commissioner as to secure that different persons were not authorized to provide regular omnibus services on the same section of any highway.

By Sch. I to the Ordinance applications made by two or more persons for road service licences to come into force on or before January 1, 1943, in respect of the same route, or of routes which were substantially the same, were assigned an order of preference which the commissioner was bound to observe in deciding which application should be granted. First in that order of preference was an application by a company or partnership comprising the holders of all the licences for the route in force under the Ordinance of 1938. Second in the order of preference was an application by a company or partnership comprising the holders of the majority of such licences. There were further priorities not material to this case. The schedule, as a condition of the grant of the licence, required payment of compensation by the applicant to other holders of licences for the route under the Ordinance of 1938, unless they had a pecuniary interest or share in the business proposed to be carried on by the applicant.

On the Colombo route and its subsidiaries the largest operators and licence holders were the M.J. bus service, of which the proprietor was M. Jayasena; the B.J. bus service, of which the proprietor was B. J. Fernando; and the Little Service Bus Company, of which the proprietors were W. K. Fernando and P. Don

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Francis Alwis. Those four named persons in association were in a position to claim that they were within the second priority as defined by the schedule, and it was they who formed the appellant company and who were the subscribers to the memorandum of association. They were also the directors of the company, and in return for the omnibuses and licences which they transferred to the company they received 5,850 shares of Rs.100 each, paid up as to 90 per cent., making a total subscribed capital of Rs.526,500 out of an authorized capital of Rs.1,000,000. In addition, they took up 50 shares paid up as to 90 per cent., making a further sum of Rs.4,500. There remained available for subscription among the other existing operators under old licences for the Kandy Colombo route 4,100 shares of Rs.100 each.

After the company was incorporated negotiations took place between the company and those other holders of licences for the route under the Ordinance of 1938, among whom were the respondent Perera and the respondents in the other six consolidated appeals. It was not necessary to consider the course of those negotiations, for it had been determined by concurrent findings of the District Court and the Supreme Court, acquiesced in by the appellant company, that the company agreed to allot to the respondent Perera shares to the value of Rs.5,000, that the appellant company had failed to perform its obligation, and that the respondent was entitled to damages from January 1, 1943, for that failure and breach of contract. By the orders of the courts below, in the action brought by the respondents against the appellant company for specific performance and damages, the company was required to allot to the respondent shares to the value of Rs.5,000.

The District Judge awarded as damages a sum equal to 50 per cent. per annum on Rs.5,000, the nominal value of the shares which ought to have been allotted, from January 18, 1943, to the date of allotment. In the High Court the respondent's counsel admitted that that award could not be supported. The Supreme Court assessed the damages at a sum equal to 20 per cent. per annum of the nominal value of the shares from January 18, 1943, to the date of allotment.

1951. November 5. *De Silva K.C.* and *Handoo* for the appellant company. Specific performance of the contract to allot the shares having been ordered, and complied with, the respondents are entitled to receive by way of damages for the breach only such loss as they had actually suffered between the time when

the shares should have been allotted and when they were in fact allotted. Those damages are limited to the amount of the dividends on the shares which the company declared during that period, together with interest thereon until payment. The respondents are not entitled to the damages which they have been awarded by the courts below.

Fox-Andrews K.C. and *Stephen Chapman* for the respondents. There does not appear to be any direct authority on the question of the assessment of damages for breach of a contract to allot shares. The principle to be applied in this, as in any other case, is that the damages awarded shall be equivalent to the loss which might be held to have been reasonably within the contemplation of the parties at the time when the contract was entered into: *Cory v. Thames Ironworks Co.*¹; *Cobb v. Great Western Railway Co.*²; *Agius v. Great Western Colliery Co.*³ The terms of the Ordinance show that what the legislature intended was that the person surrendering a licence should receive compensation on a proper basis from the person or persons acquiring the exclusive licence. The Board has to determine what are the damages which might be held reasonably to have been within the contemplation of the parties, in the event of a breach, at the time when the contract was made to allot the shares. It was in their contemplation that the company would so conduct its business as to ensure that those giving up their licences would continue to receive from the company such emoluments as would provide them with a living from their shareholding. It was reasonably within the contemplation of the parties when the contract was entered into that the company would be administered on a basis which was in conformity with normal practice. That which took place, without the knowledge or consent of the respondents—the authorization of the branch managers to retain 90 per cent. of the gross takings of their branch, and the resolutions making the company a private company—were matters which could not have been within the contemplation of the parties when the contract was made, and they had frustrated the respondents' expectations.

A reply was not required.

December 5. The judgment of their Lordships was delivered by LORD NORMAND:—In these consolidated appeals the sole question submitted for determination by the Board is one of

¹ (1868) L.R. 3 Q.B. 181, 184.

³ [1899] 1 Q.B. 413, 419.

² [1893] 1 Q.B. 459, 464; [1894]

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damages for breach of contract, in particular, what is the correct method of assessing damages in an action in which the court, having found that the defendant company was in breach of a contract to allot shares to the plaintiff, had granted an order for specific performance of that contract.

The appeal taken by the appellant company against Mr. L. A. Perera as respondent has been selected as the leading appeal, and the Board's decision on it will govern the appeals consolidated with it. [His Lordship then stated the facts set out above and continued:] On the sole question now in dispute, the proper measure of damages, the respondent's plaint contained the single statement that by reason of the breach he had suffered loss and damages to the value of Rs.750 per mensem, and it is necessary to observe that there was no allegation that the value of the shares or the quantum of profit or the rate of dividend had been reduced by fraud on the part of the directors, or by any unlawfulness or irregularity in the conduct of the company's affairs. Issues were framed, and on damages the only issue was, to what damages was the plaintiff entitled for failure to allot up to the date of allotment. In the record of the evidence a note was inserted by the District Judge the importance of which requires that it should be quoted. It runs, "I intimate to Mr. Wickremenayake [the respondent's counsel] that the assessment of his damages at Rs.750 a month would be on a false basis as that would not be the earning capacity of a bus after the route licence was given to the defendant company. He therefore states he is prepared to restrict his claim to such amount as he would be entitled to for the shares and profits on the figures in the balance sheet P11. This will be the basis of assessment of damages in all the cases. Mr. Choksy [the appellant company's counsel] states that in view of this statement he does not want to cross-examine any of the plaintiffs on the question of damages." This note is not in all respects as clear as might be desired. But it seems to the Board beyond doubt that the respondent's counsel admitted that for the purpose of assessing damages the figures as they stood in the balance sheet were correct, and that the appellant's counsel thereafter conducted his case on the footing that the balance sheet would not be questioned. Moreover, it was the respondent who produced the balance sheet, which covers the period January, 1943, to January, 1944, and he did so without making any comment or criticism, remarking only that the expenses were Rs.20,000 less than the receipts, as they approximately were. There was

evidence that the appellant company had for the first year of its operations declared a dividend of one per cent.

The District Judge awarded as damages a sum equal to 50 per cent. per annum on Rs.5,000, the nominal value of the shares which ought to have been allotted, from January 18, 1943, to the date of allotment. In the High Court the respondent's counsel admitted that this award could not be supported, and their Lordships are therefore relieved from the duty of considering it further. The Supreme Court assessed the damages at a sum equal to 20 per cent. per annum of the nominal value of the shares from January 18, 1943, to the date of allotment.

The contention of the appellant company is that the respondent, having obtained an order for specific performance of the obligation to allot the shares, was not entitled to an award of damages of more than the equivalent of the dividends at the rates declared by the company between the date when the shares should have been allotted and the date of actual allotment, with interest on the dividends until payment. Their Lordships are of opinion that this is the correct measure of damages. The party complaining of a breach of contract is not entitled to be put in a better position than he would have enjoyed if the contract had been performed according to its terms. When the contract is a contract to allot shares, the aggrieved party's position is fully restored when the shares have been allotted to him under an order for specific performance and he has received the equivalent of the dividends he would have received if the contract had been duly performed, with interest during non-payment.

The Supreme Court recognized that that was, in general, the principle to be applied, but it found that the balance sheet contained inaccuracies which ought to be rectified before damages were computed. In particular, it disallowed an item of Rs.124,179 for depreciation, on the ground that the company had entered into an agreement with branch managers, who were themselves directors, by which each branch manager should take 90 per cent. of the gross takings of his branch, out of which he was to pay various outgoings, including the cost of replacing omnibuses as they became old or unserviceable. This sum of Rs.124,179 the Supreme Court added to the profits as brought out in the balance sheet, and dealt with the whole balance sheet profits thus swelled as a sum which ought to have been distributed as dividend. The court then calculated that on this basis a dividend at the rate of 20 per cent. ought to have been distributed among shareholders, including the respondent.

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The Board has no hesitation in rejecting the considerations which moved the Supreme Court in making the award. It is a fatal objection that the trial had been conducted on the footing that the balance sheet figures were correct, and it was not open to the Supreme Court to readjust them in this manner. It is also a fatal objection that the issue whether the sum of Rs.124,179 was properly charged for depreciation was never raised in the pleadings, in the issues or in the evidence. It is a question of accountancy whether the company did not correctly set aside a reserve for depreciation of the omnibuses which were in fact its property, though the branch managers had become personally bound to replace the omnibuses out of their portion of the gross takings. There is no accountancy evidence because this question was never in issue. Finally, it is not correct to assume that the profits shown in the balance sheet, or an adjusted balance sheet, would have been, or ought to have been, wholly distributed as dividends.

The respondent's counsel did not argue the appeal on the grounds on which the Supreme Court had proceeded. He maintained that the Supreme Court's award could be justified on the ground that it represented the loss which would reasonably be in contemplation of the parties when the contract was made as the probable result of the breach of it. He asserted that an operator of a route before the enactment of Ordinance No. 47 of 1942 became entitled, either by way of compensation or by an allotment of shares of the company applying for a licence under that Ordinance, to enjoy, or, at least, to expect to enjoy, a living in return for the property and rights of which he was deprived, and that he was also entitled to expect that the business of the company would be conducted in an ordinary or normal manner, and so that this expectation of obtaining a living would not be defeated. He complained of the arrangement by which the branch managers retained 90 per cent. of the gross takings of their branch, and of resolutions by which the company became a private company with restrictions on members' rights to transfer shares, and a limitation of the number of members. All these, he said, were departures from the normal conduct of the company's affairs as contemplated when the contract to allot shares was made and had disappointed the respondent's expectation of obtaining a living from his shareholding.

Their Lordships would first observe that these contentions stray into regions not less far removed from the issues properly raised in this case than the considerations which weighed with

the Supreme Court. It is accordingly not necessary to consider them in detail. It may, however, be said that there is no warrant in the Ordinance for the proposition that operators were entitled to expect to get a living out of the compensation for which the Ordinance provides, or out of shares which they might choose to take instead of claiming compensation. It would be strange indeed if the respondent, who had one omnibus and used, according to his own evidence, to make Rs.200 or Rs.300 a month less expenses, should expect to make a living out of compensation for the loss of his business. The failure of the supposed expectation of obtaining a living is a conception too vague and desultory to be the foundation of a claim for damages. Further, a shareholder must take a company in which he invests his money with all its legal rights and powers, and he will not be heard to complain that his expectations have been defeated by the lawful and regular exercise of its powers. Now, counsel admitted that it was not competent for him in this case to impugn anything that was done in the conduct of the company's business as in excess of power or otherwise unlawful or oppressive, and his complaint that the company's affairs were carried on in an abnormal manner, besides being lacking in precision, is wholly irrelevant. This new presentation of the case for the respondent therefore fails to justify any departure from the ordinary principles of assessing compensation.

Their Lordships will humbly advise His Majesty that the consolidated appeals should be allowed, and that for the order of the Supreme Court affirming the judgment of the District Court subject to the modification that for the figure 50 the figure 20 should be substituted therein, there should be substituted an order affirming the judgment of the District Court subject to the modification that the appellant company shall pay to the respondent as damages a sum or sums equivalent to the dividend or dividends at the rate or rates declared between January 18, 1943, and the date of allotment, together with interest on such sum or such sums respectively from the date or dates when the declared dividend or dividends became payable till the date of payment of such sum or such sums. The respondent will pay the costs of the appeal.

Solicitors: *A. L. Bryden & Williams; Darley, Cumberland & Co.*

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times on certain days of the week at certain seasons of the year. The appellants, inhabitants of the village of Kakopetria, contended that the respondents had no such right, and that they (the appellants), by ancient and uninterrupted user, were entitled to certain specified water rights.

This appeal was concerned with the admissibility of a document tendered in evidence by the respondents at the trial called "Report and Reference of Salim Effendi," a surveyor in the Land Registry Office, and dated August, 1901, which, inter alia, purported to specify the practice then existing as to the taking of water by the inhabitants of various villages, including Kakopetria and Petra.

That document was received in evidence in the District Court, and its admissibility was upheld by the Supreme Court of Cyprus. The District Court granted to the respondents an injunction in the terms claimed, and that judgment was affirmed on appeal (subject to a slight variation) by the Supreme Court of Cyprus (Jackson C.J. and Williams J.).

The facts and the material terms of the document in question appear fully from the judgment of the Judicial Committee.

1951. October 31; November 1, 5, 6 and 7. *Harvey K.C.* and *Megaw* for the appellants.

Karmel K.C., *J. C. Clerides* and *Kenneth Potter* for the respondents.

December 5. The judgment of their Lordships was delivered by LORD TUCKER:—This appeal arises out of litigation between the inhabitants of two villages in Cyprus concerning their rights to the water of the river Karkotis for the purpose of irrigating their lands. The plaintiffs in the action are the present respondents (hereafter referred to as "the Petrans"), and the defendants are the present appellants (hereafter referred to as "the Kakopetrians").

The village of Petra is situate at the mouth of the river Karkotis some twelve miles distant as the crow flies to the north of Kakopetria, which lies just above the confluence of two rivers called Ayios Nicolaos and Karvounas, which unite at this spot to form the river Karkotis. There was some dispute at the trial whether the name Karkotis applied to one or both of the two confluent rivers above Kakopetria or was confined to the river below the junction. It was, however, agreed by counsel on both sides that this dispute had no bearing on any issue before the

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Board and, accordingly, it will be convenient to confine the use of the word Karkotis to the river below the confluence, and to refer to the two confluent rivers by the names Ayios Nicolaos and Karvounas. Between Kakopetria and Petra there are some ten or eleven other villages on the banks of the Karkotis river. These villages (with the exception of Galata) draw their water supply for irrigation purposes from the Karkotis by means of dams, sluices and channels by which the water is diverted in the required direction. The village of Petra claims that it relies for this purpose on four dams situate in or near the villages of Evrychou, Tembria and Korakou, a few miles upstream. In the Ayios Nicolaos river there are four dams, two of which are said to serve the village of Galata, which is the first village just below the confluence, and the other two are claimed by Kakopetria, as also are two other dams in the Karvounas river. One of the two dams in the Ayios Nicolaos is called the Frantziko dam and was the scene of the incidents giving rise to the present litigation.

The summer of 1941 was dry, and on May 27 and 28 in that year the Kakopetrians diverted the water, or part of it, at the Frantziko dam into the Kakopetrian irrigation channels, despite the protests of watermen who were present at the spot and who had been deputed by the Petrans to attend for the purpose of ensuring that the whole of the water of the river was allowed to flow down without interception so as to reach their dams at Evrychou, Korakou and Tembria. The writ in this action was issued by the Petrans on September 26, 1941, and the issue between the parties may, for the present purposes, be briefly and sufficiently stated as follows. The Petrans claimed that by ancient user they were entitled to have for their own use the full natural flow of the water of Karkotis, including the full natural flow of the water of the upper rivers Ayios Nicolaos and Karvounas, between certain specified times on certain days of the week at certain seasons of the year. The Kakopetrians, on the other hand, contended that the Petrans had no such right, but that they, by ancient and uninterrupted user, had the right to take from certain dams and sluices in the rivers Ayios Nicolaos and Karvounas (including, in particular, the Frantziko dam) such quantity of water as is proportionate to the area of irrigable land of Kakopetria, namely, approximately 300 donums, being the equivalent of 100 acres.

The present appeal is concerned with the admissibility of a certain document which was tendered in evidence by the Petrans

at the trial before the District Court of Nicosia. The document was received in evidence, and its admissibility has been upheld by the Supreme Court of Cyprus who, however, gave the appellants leave to appeal to His Majesty in Council. The District Court granted to the Petrans an injunction in the terms claimed, and this judgment was confirmed on appeal, subject to a slight variation in the terms of the injunction, with the effect that the Kakopetrians are restrained from unlawfully interfering with the respondents' rights to take or irrigate their lands from the water of, or running through, the rivers Ayios Nicolaos, Karvounas and Karkotis and/or of the dams Ayios Nicolaos, Frantziko, Appliki and Karidhi at the times specified in the statement of claim.

The document tendered and received in evidence is called "Report and Reference of Salim Effendi," and is in two parts, the first being the Report, signed and dated August 13, 1901, and the second headed "Reference" and signed and dated August 10, 1901. Annexed to this document is a sketch marked "B," which shows the course of the rivers from above the confluence at Kakopetria down to the mouth of the Karkotis at Petra. On it there are a number of spots marked with numbers from 1 to 28, and the "Reference" contains explanations of these numbers.

The Report is headed L.E. 164 with the figures /900 beneath, and is addressed to the Registrar General. It begins as follows: "In compliance with your instructions respecting the inquiries to be made to the taxims (divisions), etc., of the running water of Petra described in papers L.E. 164/900 I have the honour to report," and it proceeds to deal with the rights of the inhabitants of Petra inter se to the Karkotis water. It later states that Petra water was never assessed for verghi (i.e., tax) but the lands irrigated by it were assessed at a higher rate than those which are not irrigated by this water. It concludes as follows: "Although the water of Petra has not been separately assessed for verghi during the Tahrir Emlak it is perfectly clear that the value of the water is assessed with the lands which can be irrigated by this water, but notwithstanding to that the Muhtar and the commission of Petra gave a village certificate on behalf of the villagers of Petra declaring that the water running to their village of Petra has never been assessed for verghi and they agree that the value described in the attached V. certificate may be assessed on every hour of water.

"They gave this V. certificate for the anticipation that the water might be registered in the names of the present holders as mulk so as to enable them to deal with as they like. I

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“ prepared 148 forms showing the present possessors of the water
“ of Petra and enclosed herewith.”

The Report—as distinct from the “ Reference ”—contains no mention of the rights of the Kakopetrians or of the rights of Petra village vis-à-vis Kakopetria or any of the other intervening villages.

The document was produced by a witness from the Land Registry from a file which, he said, related to local inquiries made in respect of Karkotis water. He added “ This local inquiry was made under Law 5 of 1880.” He stated that Salim was a surveyor of the L.R.O. and that he is now dead. Since the date of the Report it had been kept in the office of the Land Registry. Objection having been taken to the admissibility of this document, the court adjourned to enable the witness to ascertain how the local inquiry was held, and whether it was for record purposes or otherwise. On the resumption the witness did not produce any instructions in writing given to Salim, but stated: “ It was made on the instructions of the Director of the “ L.R.O. to register those lands which were sold or purchased “ and for the other lands to make a note that they have the right “ of irrigation.”

In cross-examination the witness stated that Salim’s instructions were the same as those given to Yusuf Zia, which he produced. This document is dated August 11, 1893, and relates to the registration of water at Flasso, Linou and Katydata, which are villages on the Karkotis river. The instructions refer to previous instructions which had not been properly carried out, and conclude, “ Please make a list of water other than that “ flowing from sources and running through wells entered “ separately in the Field Books of Flasso, Linou, Katydata and “ explain why you did not follow your instructions.”

Law 5 of 1880 gives power in section 1 to the High Commissioner to direct a survey. By section 2 he can appoint a Director of Surveys. Section 3 requires owners and others to attend and give information when required, with liability to be fined if they refuse. Section 4 gives power to enter lands for the purpose of survey, and by section 8 occupants are required to point out boundaries.

Such was the material before the District Court on which the admissibility of this document fell to be decided.

For the respondents, the Petrans, it was contended before the Board that the document was admissible under section 4 of Law 14 of 1946 of the Laws of Cyprus (The Evidence Act of 1946),

which corresponds with the provisions of sections 1 and 6 (2) of the English Evidence Act of 1938. Further or alternatively, it was submitted that it was admissible as a "public document" under English common law rules of evidence, which are made applicable to Cyprus by section 3 of Law 14 of 1946, which enacts:—"Save in so far as other provision is made in this Law or has been or shall be made in any other Law in force for the time being, every court, in the exercise of its jurisdiction in any civil or criminal proceeding, shall apply, so far as circumstances may permit, the law and rules of evidence as in force in England on 5th day of November, 1914."

The material parts of section 4 of Law 14 of 1946 are as follows:—

"4.—(1) In any civil proceeding where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied, that is to say:—

"(a) if the maker of the statement either—

"(i) had personal knowledge of the matters dealt with by the statement; or

"(ii) where the document in question is or forms part of a record purporting to be a continuous record, made the statement (in so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have, personal knowledge of those matters; and

"(b) subject to subsection (2) of this section, if the maker of the statement is called as a witness in the proceedings:

"Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead. . . .

"(5) For the purpose of deciding whether or not a statement is admissible as evidence by virtue of the foregoing provisions, the court may draw any reasonable inference from the form or contents of the document in which the statement is contained, or from any other circumstances . . . and the court may in its discretion reject the statement notwithstanding that the requirements of this section are satisfied with respect thereto, if for any reason it appears to it to be inexpedient in the interests of justice that the statement should be admitted."

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The District Court admitted this document under section 4 of Law 14 of 1946. They said: "These exhibits, apart from being "ancient documents (being prepared on August 10, 1901) satisfy "the requirements of section 4 of Law 14 of 1946." A little later they say: "These have been produced from the archives "of the Land Registry, i.e., they were in proper custody, and we "have no doubt that these documents were purported to be a "continuous record."

In the judgment of the Supreme Court the matter was dealt with in the following passage:—"The document which seems to "have had most influence on the trial court and which has cer- "tainly influenced us, was a report accompanied by a map made "by a surveyor of the Lands Office, on the instructions of his "superiors, on August 14, 1901. It is an official document, pro- "duced from proper custody and it is nearly 50 years old. It "was admitted by the District Court under section 4 of the "Evidence Act, 1946, and also as an ancient document.

"Whether or not this document is part of a continuous record, "as mentioned in section 4 (1) (a) (ii) of the Law, seems at least "doubtful, but the maker must be supposed to have had personal "knowledge of some at least of the matters that he records, "particularly the physical situations that he describes and records "on his map. Moreover, the document is an ancient document "produced from proper custody. We think, therefore, that the "trial court was right in admitting both the report and the map "and there is no reason to think that the court gave improper "weight to them."

There appears to have been some confusion in both courts as to the ground for admitting this document apart from the provisions of section 4 of Law 14 of 1946. It was not contended before the Board that its admissibility depended on its being an "ancient document," though its age and production from proper custody dispensed with the requirement of formal proof provided it was otherwise admissible in evidence. The ground on which its acceptance is sought to be justified—apart from section 4 of Law 14 of 1946—is that it is a "public document" within the meaning of these words as appearing from a long line of English authorities.

Before considering these contentions it may be convenient at this stage to set out an extract from the "Reference," which contains the statements the reception in evidence of which was clearly the purpose for which this document was tendered, and to which statements both the District Court and the Supreme Court

attached considerable weight as tending to corroborate the evidence of the respondents' witnesses. The first three paragraphs of the Reference referring to the sketch plan are as follows:—

"No. 1 represent the dam of the channel called Frandjiko through which the people of Kakopetria take their water every day except Tuesday. They take their water from the Karioti river and convey it through the aforesaid channel by blocking up the river with brushwood and stone so much as the channel could carry.

"The people of Kakopetria take their water on Saturday, Sunday, Monday, Wednesday and Thursday from the appearance in their village of Pleiades till the sunrise, and on Friday from the appearance of Pleiades until the shadow of a standing man will approach 7 feet, a.m., from the spot standing to the shadow of his head.

"They continue to take their water in the aforesaid time from June 14 to August 14, and from August 15 to June 13 of the following year they commence to take their water from the appearance of Orion's belt instead of Pleiades."

Apart from the question of the admissibility of this document, counsel for the Petrans contended that he had concurrent findings of fact in his favour which could be supported even if the document should have been excluded. Their Lordships have carefully considered the judgments of the District and the Supreme Court from this angle, but have reached the clear conclusion that this document played a large part in the determination of the questions of fact, and that it is, to say the least, open to considerable doubt whether in the absence of this document the trial court would have arrived at the same conclusion. If, therefore, this document was not properly received in evidence a new trial cannot be avoided. Their Lordships will accordingly proceed to address themselves to the question of the admissibility of this document as the determining factor in this appeal.

The applicability of section 4 of Law 14 can be dealt with quite shortly. Counsel for the respondents did not contend that the Report and Reference together with the attached sketch was of itself a "continuous record" within the meaning of the section, but he argued that the document came from a file which contained a collection of inquiries and reports on one subject-matter, namely, Karkotis water, and was therefore admissible as forming part of a record purporting to be a continuous record. Their Lordships are unable to accept this submission. The evidence with regard to the file was very scanty, and amounted

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to little more than that it appeared to contain the instructions given to Yusuf Zia in connexion with the registration of water at Flasso, Linou, and Katydata in the year 1893. Without attempting to give a definition of "continuous record," it is sufficient to say that the mere existence of a file containing one or more documents of a similar nature dealing with the same or a kindred subject-matter does not necessarily make the contents of the file a "continuous record" within the meaning of the section. It is not necessary to consider in this connexion whether, in any event, the court could reasonably infer that there was any duty imposed on Salim to record the matters set out in the opening paragraphs of the "Reference," but this question will be dealt with hereafter in relation to the admissibility of the exhibit as a public document. Their Lordships are accordingly of opinion that the necessary foundation for the admissibility of this document under section 4 of Law 14 of 1946 was never established.

It remains to consider its admissibility as a "public document." Public documents in this connexion may be classified under different heads, but the class with which the Board is now concerned is that class which comprises documents which are brought into existence as a result of a survey, inquiry or inquisition carried out or held under lawful authority, and it is to this class of document that the observations which follow are confined.

The classic authority on this question is the speech of Lord Blackburn in *Sturla v. Freccia*.¹ That case was concerned with the report of a committee appointed by a public department of a foreign State and acted upon by the Government of that State but held to be inadmissible as a public document. Lord Blackburn, referring to the judgment of Parke B. in *Irish Society v. Bishop of Derry*,² used these words³: "Now, my Lords, taking that decision, the principle upon which it goes is, that it should be a public inquiry, a public document, and made by a public officer. I do not think that 'public' there is to be taken in the sense of meaning the whole world. . . . But it must be a public document, and it must be made by a public officer. I understand a public document there to mean a document that is made for the purpose of the public making use of it, and being able to refer to it. It is meant to be where there is a judicial, or quasi-judicial, duty to inquire, as might be said to be the case with the bishop acting under the writs issued by

¹ (1880) 5 App.Cas. 623.

³ 5 App.Cas. 643.

² (1846) 12 Cl. & F. 641.

“ the Crown. That may be said to be quasi-judicial. He is acting for the public when that is done; but I think the very object of it must be that it should be made for the purpose of being kept public, so that the persons concerned in it may have access to it afterwards.”

And referring to *Arnold v. Bishop of Bath and Wells*⁴ he said⁵: “ The bishop made his visitation, and recorded it with the wish and intent that it should be kept publicly as a register, to be seen by everybody in his diocese. If the bishop had not the right to make such an inquiry, so as to make it evidence in future, that is another affair; but if he had, then he was a public officer performing what he thought a public duty, with the view and intent that it should be public.”

These passages stress the dual requirements that the document should not only in fact be available for public inspection, but that it should have been brought into existence for this very purpose, and Lord Blackburn was explaining his interpretation of the judgment in *Irish Society v. Bishop of Derry*⁶ where Parke B. in the year 1846 had said: “ In public documents, made for the information of the Crown, or all the King’s subjects who may require the information they contain, the entry by a public officer is presumed to be true when it is made, and is for that reason receivable in all cases, whether the officer or his successor may be concerned in such cases or not.”

One hundred years later Lord Goddard C.J., sitting as a member of the Divisional Court in *Lilley v. Pettit*,⁷ had occasion to consider this language of Parke B. in the light of Lord Blackburn’s speech in *Sturla v. Freccia*,⁸ and said⁸: “ In my opinion it is quite clear that Parke B. did not mean to lay down that every document that may be prepared by a servant of the Crown for the information of His Majesty is a public document. It may be that the words ‘ for the information of the Crown, or all the King’s subjects who may require the information they contain ’ should be read as meaning ‘ for the information of the Crown, that is to say, all the King’s subjects who may require the information they contain.’ But, however that may be, he was there dealing with documents of record in the courts. Many documents are prepared for the information of the Crown, that is, the executive, which are of a highly confidential nature and it is well known, as has

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⁴ (1829) 5 Bing. 316.⁵ 5 App.Cas 623, 646.⁶ 12 Cl. & F. 641, 668.⁷ [1946] K.B. 401.⁸ Ibid. 406.

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“recently been held by the House of Lords, that the Crown has
“an absolute right to object to produce any document on the
“ground that it would be against the public interest so to do:
“(Duncan v. Cammell, Laird & Co.⁹). It is difficult, therefore, to
“see how a document to which the public can have no access
“and which the Crown can refuse to produce under a subpoena
“could by any possibility be described as a public document.”

Later Lord Goddard observed ¹⁰: “It seems to me clear from
“Lord Blackburn’s speech that to be a public document it must
“be one made for the purpose of the public making use of it.
“Its object must be that all persons concerned in it may have
“access to it.”

Save for the doubts expressed by Vaughan Williams L.J. (which doubts were not shared by the other two members of the Court of Appeal, namely, Stirling and Cozens-Hardy L.JJ.) in *Mercer v. Denne* ¹¹ whether Lord Blackburn’s speech may not have been expressed in rather too wide terms, his definition has now been generally accepted for over seventy years, and their Lordships can see no reason for attempting to qualify it in any respect.

A number of cases prior in date to *Sturla’s* case ¹² were cited by leading counsel for the respondents in support of his submission that the document, being a revenue survey made for the Crown under a public statute, was admissible as a public document made in the public interest regardless of whether it was preceded by a public inquiry or was subsequently available to the public. If this were the true test it would be contrary to Lord Blackburn’s definition, but their Lordships find nothing in the authorities relied on which is necessarily inconsistent with *Sturla’s* case ¹² which, as stated above, they regard as containing an authoritative statement of the law as to the admissibility of this class of document.

Applying Lord Blackburn’s test to the document in question, their Lordships consider that it was not shown by the plaintiffs in the action, either intrinsically from the contents of the document itself or from other evidence, (1) that a judicial or semi-judicial inquiry was ever held by Salim as to the rights of the Kakopetrians to Karkotis water or as to the conflicting claims of Petra and Kakopetria to such water; (2) that the inquiry in fact held by Salim was held with the object that his report thereon should be made public; or (3) that the report was in fact at all times open to public inspection or that an inference to this effect should

⁹ [1942] A.C. 624.

¹⁰ [1946] K.B. 407.

¹¹ [1905] 2 Ch. 538.

¹² 5 App.Cas. 623.

be drawn from the fact that it was produced in evidence without objection by the Land Registry authorities. Furthermore, they are of opinion that, in any event, it was not established that it was any part of the duty of Salim to record the matters set out in the opening paragraphs of the "Reference" which have been set out above, and they consider that it is implicit in the authorities (and, indeed, it was expressly so stated in *Nothard v. Pepper*¹³ and *Attorney-General v. Antrobus*¹⁴) that the statements in a document tendered in evidence as a public document should be statements with regard to matters which it was the duty of the public officer holding the inquiry to inquire into and report on.

For these reasons their Lordships are of opinion that the document in question was wrongly admitted in evidence, and they will accordingly humbly advise His Majesty that this appeal should be allowed and the judgments of the District Court of Nicosia and the Supreme Court of Cyprus set aside and the action remitted to the District Court for a new trial of the action. The respondents must pay the costs of the appeal to the Board (such costs not to include the costs of printing in the Record the arguments of counsel in the courts below) and the costs of the appeal to the Supreme Court of Cyprus. The costs of the first trial will be in the discretion of the District Court on the new trial.

Solicitors: *E. F. Turner & Sons; Bischoff & Co.*

¹³ (1864) 17 C.B.N.S. 39, 49, 52.

¹⁴ [1905] 2 Ch. 188, 194.

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NEW SOUTH WALES APPELLANT;
AND
FRANCIS HARMSWORTH WAY AND OTHERS RESPONDENTS.

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ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

Australia (New South Wales) — Revenue — Death duty — Settlement — Charitable trust — Whether new trust "to take effect after" settlor's death — No interest reserved to settlor — Stamp Duties Act, 1920-1940 (N.S.W.), s. 102 (2) (a), (c) and (d).

* *Present*: LORD NORMAND, LORD OAKSEY and LORD RADCLIFFE.

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A deed of settlement, by which certain funds were held on trust by the settlor and two others for specified charitable purposes in Australia, provided in clause 3 that: "The time, manner and the "head or heads under which the application and appropriation of "the said trust fund and the said income shall be made and all "other details and particulars as to such application and appropriation shall be in the absolute discretion of the trustees but "during the lifetime of the settlor subject to his direction and "approval . . ." Clause 24 of the deed provided that: ". . . The "trustees may whether during the lifetime of the settlor or afterwards and shall during the lifetime of the settlor if he so directs "apply and appropriate any property including moneys belonging "to the trust for the purposes of acquiring by purchase or exchange "from the settlor or his executors any real or personal property "valued for the purposes of such purchase or exchange at a sum "at least five per cent. below the valuation of such real or personal "property so acquired as ascertained by some independent valuator ". . ." On a claim under section 102 of the Stamp Duties Act, 1920-1940, of New South Wales for death duties on the trust property on the death of the settlor:—

Held, first, that the settlement created one trust only, which took effect immediately the settlement was created and continued as one. The effect of clause 3 was not to bring into effect a new trust on the death of the settlor, to be operated by the surviving trustees, and accordingly death duty was not payable on the trust property under section 102 (2) (a) of the Stamp Duties Act, 1920-1940, which provides that the duty is payable on "all property which the "deceased has disposed of . . . by a settlement containing any "trust in respect of that property to take effect after his death . . ."

Burrell and Kinnaird v. Attorney-General [1937] A.C. 286 distinguished.

Rabett v. Commissioner of Stamp Duties [1929] A.C. 444, 448, explained.

Held, secondly, that the provision in clause 24 empowering the settlor to require that the trust funds should be applied for the purpose of acquiring property from him, was a fiduciary power, to be exercised only for the benefit of the settlement, and was not such as to reserve to him an interest in the settled property or a right to reclaim or restore it to himself. That power of direction was not the kind of benefit or interest with which section 102 (2) (c) and (d) of the Act were concerned, and accordingly death duty was not payable thereunder on the trust property.

Judgment of the High Court of Australia (1949) 79 C.L.R. 477, affirmed.

APPEAL (No. 43 of 1950) from an order of the High Court of Australia (August 18, 1949) reversing a judgment of the Full Court of the Supreme Court of New South Wales (May 26, 1949).

On September 5, 1928, Sir Robert Gillespie made a settlement under which he transferred and assigned to himself and two

others certain funds and property to be held on trust for specified charitable purposes in Australia. By clause 3 of the settlement: "The time, manner and the head or heads under which the application and appropriation of the said trust fund and the said income shall be made and all other details and particulars as to such application and appropriation shall be in the absolute discretion of the trustees but during the lifetime of the settlor subject to his direction and approval and the settlor places on record his belief that it will be found advisable to have completely distributed the trust fund and wound up the trust within ten or fifteen years."

Clause 24 provided that: "The trustees may also apply and appropriate any property belonging to the trust in its then present condition for any trust purposes and may also use any of the moneys of the trust either corpus or income or both in purchasing any land or land and buildings or in erecting buildings or in altering or in improving buildings to be used or applied for any such purpose. The trustees may whether during the lifetime of the settlor or afterwards and shall during the lifetime of the settlor if he so directs apply and appropriate any property including moneys belonging to the trust for the purposes of acquiring by purchase or exchange from the settlor or his executors any real or personal property valued for the purposes of such purchase or exchange at a sum at least five per cent. below the valuation of such real or personal property so acquired as ascertained by some independent valuator appointed by the trustees other than the settlor."

The settlor died on August 2, 1945. Thereafter, the Commissioner of Stamp Duties of New South Wales, the present appellant, founded on clauses 3 and 24 as bringing the trust fund within the charge to death duty imposed by section 102 (2) of the Stamp Duties Act, 1920-1940, of New South Wales, which provided:—

"For the purposes of the assessment and payment of death duty but subject as hereinafter provided, the estate of a deceased person shall be deemed to include and consist of the following classes of property:—

"(2) (a) All property which the deceased has disposed of . . . by will or by a settlement containing any trust in respect of that property to take effect after his death:

"Provided that the property deemed to be included in the

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“ estate of the deceased shall be the property which at the time
“ of his death is subject to such trust.

“(c) Any property passing under any settlement, trust, or
“ other disposition of property made by the deceased . . .

“(i) by which an interest in or benefit out of or con-
“ nected with that property, or in the proceeds of the sale
“ thereof, is reserved either expressly or by implication to
“ the deceased for his life or for the life of any other person,
“ or for any period determined by reference to the death of
“ the deceased or of any other person; or

“(ii) which is accompanied by the reservation or assur-
“ ance of, or a contract for, any benefit to the deceased for
“ the term of his life or of the life of any other person, or
“ for any period determined by reference to the death of the
“ deceased or of any other person; or

“(iii) by which the deceased has reserved to himself the
“ right, by the exercise of any power, to restore to himself
“ or to reclaim that property or the proceeds of the sale
“ thereof.

“(d) Any property comprised in any gift made by the
“ deceased at any time . . . of which bona fide possession and
“ enjoyment has not been assumed by the donee immediately
“ upon the gift and thenceforth retained to the entire exclusion
“ of the deceased, or of any benefit to him of whatsoever kind
“ or in any way whatsoever whether enforceable at law or in
“ equity or not and whenever the deceased died.”

The respondents were the executors of the will of the settlor.

The question of law submitted for the opinion of the Supreme Court of New South Wales by the Commissioner of Stamp Duties was: “Should the property which was at the date of
“ death of the testator subject to the trusts of the said settle-
“ ment be deemed to be included in his estate for the purposes
“ of the assessment and payment of death duty thereon?”.

The Supreme Court of New South Wales (Jordan C.J., Maxwell and Owen JJ.) answered the question in the affirmative, but, on appeal, their decision was reversed by the High Court of Australia (Dixon, McTiernan, Williams and Webb JJ.).

The Commissioner appealed.

1951: October 30, 31; November 1. *Sir Frank Soskice K.C.* and *Gahan* for the appellant. First, the effect of clause 3 of the settlement, which provides that the application of the trust fund

or of the income is to be in the absolute discretion of the trustees, except in the lifetime of the settlor, when it is to be subject to his direction, enables the appellant under section 102 (2) (a) of the Stamp Duties Act to say that during the lifetime of the settlor there was a trust in favour of various persons, and that from his death there was a new trust in favour of persons in the surviving trustees' discretion. It was a new obligation which came into existence after the settlor's death, and was a trust "to take effect after his death" within the meaning of subsection (2) (a). In this connexion the Supreme Court of New South Wales said that *Rabett v. Commissioner of Stamp Duties*,¹ which was decided under the same statute as the present case, could not be distinguished. Either what was said in that case² was wrong, or the appellant here must succeed. The real question under subsection (2) (a) is, how are the words "to take effect after his death" to be construed? They are not words of art. A new trust came into effect after his death; while he was alive its provisions were suspended.

Secondly, clause 24 of the settlement reserved to the settlor a right, which was not of a fiduciary character to be exercised only for the benefit of the trust, but one which he might exercise in his own interests and to his own advantage, to get back out of the settlement, on certain terms, property comprised in it. It was a beneficial right, and might be of considerable advantage to him. If that be, on construction, the true effect of clause 24, then the settlor had, within the meaning of subsection (2) (c) (i) of section 102 of the Act, reserved expressly an interest out of the trust for his life. Alternatively, under subsection (2) (c) (iii) he had reserved to himself by clause 24 a right in the exercise of the power "to restore to himself or to reclaim that property or the proceeds of the sale thereof."

The case for the appellant really turns on his interpretation of clause 24 of the settlement and the application to it of subsection (2) (c) (i) and (iii) of section 102. During the lifetime of the settlor, if he so directed, the trustees must apply and appropriate any property, including moneys belonging to the trust, for the purpose of purchase or of exchange. If he did so direct, the property which was to pass from him to the trust under the terms of the purchase or exchange was to be valued by an independent valuer appointed by the trustees other than the settlor. The basis of the judgment of the High Court was that that

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¹ [1929] A.C. 444.² *Ibid.* 448.

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power of direction in the settlor was only a fiduciary power. The settlor, it is submitted, had an interest; he was to have the right to direct. That was not a right which he was bound to exercise with the exclusive object of benefiting the trust—clause 24 said nothing of the sort. It was a right of value to him, and was therefore an interest. The application of section 102 (2) (c) (iii) really turns on the same point. If it be right that clause 24 had the effect contended for, then it conferred “an “interest” within subsection (2) (c) (i), a “benefit” within (c) (ii), and a “right to restore” within (c) (iii), and possession had not been assumed “to the entire exclusion of the deceased” under subsection (2) (d). In *Vestey's (Lord) Executors v. Inland Revenue Commissioners*³ it was a fiduciary right.

It is difficult to extract any principle as to the particular test which ought to be applied in respect of a particular settlement. The words of clause 24 should be given their ordinary English language meaning, and the test to apply is whether, construing them in that way, they would bring about an impossible result. The words clearly gave to the settlor the right to reserve to himself an interest in the trust property. The power should be construed as a non-fiduciary power; if it is, there is no difficulty at all; the clause did exactly what it said. Further, the existence of the special valuation provisions, which gave the trust an extra measure of protection, makes it even more difficult to construe this as a fiduciary power. Had it been intended to say that during his lifetime the settlor was to be entitled to stipulate which properties were to come to the trust in his capacity as trustee, it would have been easy to say so, but it was not so stated. In clause 24 he is clearly designated as the person who gave, and not as a trustee himself; he was acting in his capacity as donor. This was a power which he retained for himself. The word is “direct”; he was entitled to order them to do so; he had, as was said in the judgment of the High Court, “a floating “right of selection.” He had an “interest” if he had a right of selection. On the meaning of “interest,” see *Attorney-General v. Farrell*⁴ and *In re Cochrane's Settlement Trusts*,⁵ which show how wide an interest may be.

Even if this be a fiduciary power, it does not necessarily follow that the settlor had no interest, for the effect of exercising the power was that he must get back some of the trust property, and in those circumstances it cannot be said that he had no

³ [1949] 1 All E.R. 1108, 1115.

⁵ [1945] Ch. 285, 290.

⁴ [1931] 1 K.B. 81, 96.

interest. If this be a non-fiduciary power, then clearly subsection (2) (c) (iii) is applicable on the plain meaning of the words. The property subject to the trusts was subject to death duty by virtue of section 102 of the Act.

G. E. Barwick K.C. (of the Australian Bar) and *J. H. A. Sparrow* for the respondents. With regard to clause 3 of the settlement and the application of section 102 (2) (a) of the Act, reliance is placed on the reasoning of the High Court. Only one trust was created, which took effect immediately and indefeasibly on the execution of the settlement; there was not a new trust which took effect after the settlor's death.

As to clause 24 of the settlement, in saying that it gave a beneficial right to the settlor to compel the trustees to transfer to him a particular part or all of the trust property, the appellant is completely inverting the clause. No power was given to the settlor himself to purchase any part of the trust property. He could never offer cash for a trust asset, but was limited to offering property only. Clause 24 gave a fiduciary power to the trustees; it was a power which could only be exercised for the benefit of the trust. It did no more than oblige the trustees to exercise their fiduciary power at the instance of the settlor. The word "shall" did no more than to enable him to require them to exercise their power, and did not delete the suggested words "for the benefit of the trust." The underlying assumption was that the settlor would always be a trustee, and would have the dominant voice as to investment. The reason for clause 24 was to widen the power of investment of the trustees by enabling them (a) to acquire any personal property, and (b) to acquire property from one of their number. Clauses 3 and 24 both support the view that the power to direct was to persist during trusteeship.

The settlor had no "interest" under section 102 (2) (c) (i) in any trust or in connexion with any trust property by reason of the obligation in clause 24. With regard to subsection (2) (d), it must be ascertained whether the benefit to the settlor was in some way derogatory of possession and enjoyment of the thing given. On the construction contended for there was no benefit to him under subsection (2) (c) or (d). There was no interest or benefit in the settlor connected with trust property under (c) (i); there was no reservation of benefit to him under (c) (ii), and under (c) (iii) no reservation of the right by exercise of any power to restore to himself or to reclaim the property. On the true construction of clause 24 bona fide possession and enjoyment

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of the property comprised in the settlement within the meaning of section 102 (2) (d) was assumed by the donees immediately on the execution of the settlement and was thenceforth retained to the entire exclusion of the settlor or of any benefit to him. [Reference was made to *St. Aubyn v. Attorney-General*⁶ and to *In re Cochrane's Settlement Trusts*.⁷] No interest, power or benefit of any kind whatsoever was reserved to or enjoyed by the settlor out of or in respect of or in connexion with the subject-matter of the settlement.

Sir Frank Soskice K.C. in reply. The crucial point of the whole case is whether the settlor could exercise the right in clause 24 in his own interest or must he exercise it solely for the benefit of the trust. If he gave the other trustees a direction, they had to comply with it, and in deciding what they did, they must, of course, serve the interests of the trust, and one of the incidents of the trust was that the settlor had reserved to himself a power in his own interests, and they had to comply with that. There is a beneficial power retained by the settlor for his life. [Reference was made to *Grey (Earl) v. Attorney-General*.⁸]

December 10. The judgment of their Lordships was delivered by LORD RADCLIFFE:—This appeal relates to a claim for death duties on the death of one Robert Winton Gillespie, who died on August 2, 1945. The property which is said to be subject to the claim consists of certain funds which, at the date of his death, were held on the trusts of a settlement for charitable purposes made by him many years previously. Two clauses in that settlement are founded on by the appellant, the Commissioner of Stamp Duties for the State of New South Wales, as bringing the trust funds within the charge to duty imposed by the Stamp Duties Act, 1920–1940 (to use its current citation), of New South Wales.

The material section for the purposes of the claim is section 102 of that Act. Alternative claims are preferred under subsection (2) (a), subsection (2) (c), each of the three sub-divisions of which is relied on, and subsection (2) (d). The relevant portions of the section are thus as follows, it being common ground that if these trust funds fall within any of the categories there described they will be liable to a charge for duty. [His Lordship set out the terms of section 102 (2) (a), (c) (i), (ii) and (iii) and (d), and continued:] At first sight it is not easy to see what there is in the settlement made by Sir Robert Gillespie which could bring

⁶ Ante, 15.

⁸ [1900] A.C. 124.

⁷ [1946] Ch. 285.

its funds within the charging provisions of this section. The settlement, which was made on September 5, 1928, was a trust disposition under which Sir Robert, as settlor, transferred and assigned to himself and two other gentlemen certain specified funds and property to be held on the trusts and subject to the conditions and provisions set out in the deed. In effect, the trust fund was to be held by the trustees on trust to pay and apply it, and its annual income, towards lawful charitable purposes under the heads of “(a) educational, (b) the relief of poverty in “Australia, and (c) the general benefit of the community in “Australia not falling under the preceding head,” but subject to such provisions and conditions as were set out in later portions of the document.

Two of those provisions are put forward as bringing the property within the charge of section 102. The first is clause 3, which immediately follows the declaration of the charitable purposes. [His Lordship quoted clause 3 and continued:] The appellant argues that the effect of this clause is that on the settlor’s death, when his power of direction and approval necessarily determined, a trust took effect after his death within the meaning of section 102 (2) (a), because a new trust arose for the objects of the charity, those objects being thereafter selected by the existing trustees freed from the settlor’s power of direction and approval.

The second provision, clause 24, occurs, inappropriately, in a chapter of the deed entitled “Application of Income.” It immediately precedes a clause dealing with the trustees’ powers of investment, and it runs as follows. [The terms of clause 24 were stated.] The appellant argues that the effect of this clause is to reserve to the settlor some interest in, or benefit out of, or connected with the trust property, or a right to reclaim or to restore it to himself, and that by one or other of the roads offered by section 102 (2) (c) and (d), the appellant is entitled to succeed in his claim for duty.

It will be convenient to deal first with clause 3 and section 102 (2) (a), and to defer consideration of clause 24, the effect of which depends, primarily, on a conclusion as to the construction that ought to be placed on its words.

The appellant’s argument on section 102 (2) (a) succeeded with the majority of the Supreme Court of New South Wales; it was rejected on appeal by the High Court of Australia. The basis of the Supreme Court’s decision was that the settlement contained two trusts, one for those recipients of charitable bounty

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whom the settlor might select during his life, the other, "to take effect after his death," for those recipients whom the trustees might select in the period following on his death.

The situation was thus likened to that which arose in *Burrell and Kinnaird v. Attorney-General*,⁹ although it must be observed that *Burrell's* case⁹ was a decision as to what constitutes a "passing" of property for the purposes of section 1 of the Finance Act, 1894, of the United Kingdom, and it has no direct bearing on the meaning of the words "to take effect after death" in the Stamp Duties Act of New South Wales. The High Court, on the other hand, treated the settlement as creating one trust and one trust only, a trust for charitable purposes, and this trust, in their view, took effect immediately the settlement was created and continued as one despite the fact that during its continuance different persons might have the right or duty of deciding in what manner the trust funds were to be applied.

Their Lordships agree with the view of the High Court. Firstly, this trust was not in any true sense a trust for different groups of beneficiaries. It was from beginning to end a trust for charity or specified charitable purposes, and those persons who may from time to time receive payments or other benefits out of the trust funds are less beneficiaries than objects of the charitable purpose. This circumstance alone distinguishes this case from *Burrell's* case,⁹ in which the situation that had to be considered was one where there were two groups of beneficiaries, changing in their composition on the occasion of a death, though including persons common to each group. The real issue was whether the trust fund as a whole ought to be treated as passing notwithstanding the continuing membership of those persons. Here, there was no separate trust for any new group of owners that took effect after the settlor's death.

But, secondly, it is apparent from the judgment of Jordan C.J., which expresses the views of the majority of the Supreme Court, that the two trusts which he extracted from the provisions of clause 3 consisted as much of the powers of selection exercisable first by the settlor and then by the remaining trustees as of the trusts properly so called for the charitable purposes which the trust deed defined. To look at the matter in this way is to treat a mere right or duty of exercising a discretion, or taking a decision in the course of the administration of the trust, as if it were itself a trust to take effect after the death within the meaning of

⁹ [1937] A.C. 286.

section 102 (2) (a). Their Lordships do not think that this is a sound construction of that subsection; nor do they think that the decision of the Board in *Rabett v. Commissioner of Stamp Duties*,¹⁰ which clearly weighed with the Supreme Court in their decision, ought to be regarded as an authority for such a proposition.

In *Rabett's* case¹⁰ the settlement to be considered was a marriage settlement of personalty in common form. The death which was said to attract duty was that of the husband and settlor and, since the wife had been given the first life interest in the settled fund, the situation of affairs as at the husband's death was that the wife's life interest, already in possession, continued to subsist and, as there were surviving children of the marriage, their interests in reversion remained interests in reversion, but subject to the effect of any appointment which the wife might make in exercise of the special power of appointment among children and remoter issue created by the settlement. Even if the children's interests alone were to be considered, it would be difficult to say of such a settlement that it did not contain a trust to take effect after the settlor's death.

Nor was such an argument preferred until the case came to be argued before the Board. Until then it had been assumed that a claim for duty did arise, the issue being whether the whole value of the settled property ought to be included in the dutiable estate or only so much of that value as exceeded the value of the widow's life interest. That, indeed, was the sole question which the Commissioner of Stamp Duties had submitted for the consideration of the court. Lord Buckmaster, who delivered the opinion of the Board, dealt with the appeal without strictly distinguishing between the two lines of argument. The foundation of his decision is to be found in the words¹¹: "But the words "of the section do not provide that the duty only attaches to "property in respect of which the trust arises or takes effect on "the death of the settlor but after his death, and their Lordships "see no escape from the conclusion that property of the deceased "settled by an instrument which contains trusts that take effect "after and by reference to his death is to be deemed part of the "estate." This conclusion was sufficient to dispose of the appeal.

Difficulty has arisen because of certain words which Lord Buckmaster went on to use in meeting one branch of the argument—that even if the settled property itself was deemed to pass

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¹⁰ [1929] A.C. 444.¹¹ *Ibid.* 448.

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the value of the widow's life interest ought to be deducted from the dutiable estate. What he said was¹¹: "Nor can their Lordships assent to the view that as the testator might, had he thought fit, have given his wife in cash the present value of her life interest and then settled the remainder, the result is the same when he adopted a different method of disposition. The section assumes that the testator has disposed of the property, and the only condition required for duty to attach is that the settlement contains trusts to take effect after his death. In the present case the trusts that took effect after his death were: (1) a trust enabling his widow alone to sell and vary investments; (2) a trust enabling her if the joint power was unexercised to appoint among the children by deed or will; and (3) a trust for the benefit of the children in default of appointment and subject to their mother's life interest; and these trusts affected the whole settled property, and not that part only which would be left if the value of the wife's life interest were taken away."

Their Lordships have given careful attention to this passage, but they are satisfied that it ought not to be taken as a decision that each of the three provisions which are listed under the heads (1), (2) and (3) constitutes by itself a trust to take effect after the death for the purposes of section 102 (2) (a). What Lord Buckmaster was concerned to establish was that there was a trust within the meaning of the section that affected the whole settled property and not merely the "value" represented by the value of the reversions. This is plainly right. So long as there was one such trust, it did not matter whether there were others as well, and it is only fair to assume that had Lord Buckmaster intended to give a binding decision as to the status of each of the "trusts" which he mentions he would have been altogether more precise in his language. On the contrary, he seems to have been at no pains to state them accurately: (1) was neither a trust nor even a power; under the settlement, a copy of which has been made available to their Lordships in this appeal, the widow had nothing but the usual right to give or withhold her consent to a proposed change of investment: (2) was not a trust; it was the usual special power of appointment among children or remoter issue; no doubt, had there been an appointment, there would have been a trust for the appointees and Lord Buckmaster's language may have been intended to extend to such a trust: (3) was, of course, a trust.

¹¹ [1929] A.C. 444, 448.

Having regard to these considerations their Lordships are of opinion that the first branch of the appellant's argument must fail.

Clause 24 of the trust deed is not in itself a complete piece of machinery. But the mere fact that it is formally incomplete is no reason for reading into it more than the provisions of the clause actually contain. Its main purport, at least, is reasonably clear. It is to afford authority for the use or application of trust funds for certain purposes or in certain ways that would not otherwise be permissible. It is thus something analogous to, but not the same as, the investment clause which immediately follows. The second half of the clause is designed to authorize the use of trust funds for the purpose of acquiring property from the settlor, who was in the inception, and was no doubt likely to remain, one of the trustees. But for the power of direction given to the settlor the nature of the clause would be quite plain. But there has been engrafted on the authority thus given to the trustees a right for the settlor during his lifetime to require that trust funds shall be applied to the purpose of such an acquisition, and it is argued that this right to control the action of the trustees brings the trust property within one or other of the categories of section 102 (2) (c) and (d). This contention prevailed with all the members of the Supreme Court of New South Wales, who held that an interest in the settled property had been reserved to the settlor during his life. It was rejected by the High Court, partly on the ground that the power of direction given to the settlor was a fiduciary power to be exercised only for the benefit of the settlement and partly because, whatever the power was, it did not amount to a reservation to the settlor of an interest in the settled property or of a right to reclaim or restore it to himself.

Their Lordships are of opinion that the views of the High Court are well-founded, and it is unnecessary to make any material addition to what is said in the judgment of Williams J., which gives the reasons of the court. The settlor's power of direction is to be taken as fiduciary because in its context it is merely a right to secure that his views would, in the event of disagreement, prevail over the views of the other trustees. It was not, of course, inevitable that he would always remain a trustee during his life, but the circumstances were such that it was natural to assume that he would. Even if he did not, the question that he was given power to decide was the question how trustees should apply their trust funds, and in the absence of express provision to the contrary the presumption would be that his decision was to be given for the benefit of the settlement, not of himself.

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Indeed, he had inserted in the clause a stipulation that, if the trust did acquire property from him, it must be on terms that would be to his own pecuniary disadvantage and to the trust's advantage. It was argued that the presence of this stipulation showed that his direction was regarded as non-fiduciary, since otherwise it would not need to be controlled by this limitation. But this can hardly be. The stipulation operates even if the trustees acquire property from him without a direction, so it is not aimed at his special power of direction; and it seems a curious way of establishing that a power is beneficial to show that by its terms it cannot be exercised in a way that affords a benefit.

If the power of direction is, as their Lordships think, a fiduciary one, there is no ground for regarding it as the kind of benefit or interest with which section 102 (2) (c) and (d) are concerned. Apart from that, however, the power is not one that amounts to an interest in or benefit out of or connected with the trust property. It does not extend far enough to reach the trust property. All that it could do would be to substitute the settlor's decision that trust funds should be used to acquire property from himself for a resolution of the other trustees to the same effect. Given the achievement of that resolution, the settlor would have no power under the clause to decide what items of the trust fund should be used for that purpose. The decision on that point would lie with the trustees generally, and, if they decided to proceed by way of exchange, not of purchase, it would be for them again to decide at what value they would be prepared to release the item or items selected in exchange for the settlor's property valued as the trust deed requires. All this goes to show that, whether the settlor's power of direction was fiduciary or not, it was not in any event such a power as gave him any hold over the trust funds. Their Lordships were pressed with the consideration that the settlor could at least achieve this much: by tendering property of his own worth five per cent. more than the value of the whole trust property (assuming that to be capable of undisputed appraisal) and by exercising his power of direction he could make sure of recovering any single item of the trust funds since he would be entitled to get back the lot. But this is at best to describe an incidental consequence of the power of direction rather than to describe the nature of the power itself, and it does nothing to establish that a right is a benefit when it can only be exercised to the detriment of its holder. Whether or not a power having such a possible consequence could properly be described as a right to restore to the holder or to reclaim the

settled property within the meaning of subsection (2) (c) (iii), it cannot amount to such a right if the settlor can only act by way of effecting a change of investment in the interests of the settlement.

Their Lordships will humbly advise His Majesty that the appeal from the order of the High Court of Australia dated August 18, 1949, should be dismissed. The appellant must pay the costs of this appeal.

Solicitors: *Light & Fulton; Ashurst, Morris, Crisp & Co.*

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		AND	
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June 12,
13, 14;
July 25.

Emergency legislation—War damage—Rent restricted flats demolished by enemy action—Compulsory acquisition of site by local authority—Notice to treat served on landlords before any war damage made good—Cost of works payment—Assessment of value of notionally rebuilt flats—Assumption that new tenancies not rent-restricted—Town and Country Planning Act, 1947 (10 & 11 Geo. 6, c. 51), s. 53 (1) (a).

Section 53 (1) of the Town and Country Planning Act, 1947, provides: "Where an interest in land . . . is an interest in a "hereditament . . . which has sustained war damage, and any of "that damage has not been made good at the date of the notice "to treat, then if the appropriate payment under the War Damage "Act, 1943, would . . . be a payment of cost of works—(a) the value "of the interest for the purposes of the compensation payable in "respect of the compulsory purchase shall . . . be taken to be the "value which it would have if the whole of the damage had been "made good before the date of the notice to treat . . ."

In 1944 a block of working-class dwellings owned by the claimants and let on tenancies at rents controlled by the Rent Restriction Acts, was demolished by enemy action. In 1948, no rebuilding having been done, the local authority by virtue of a compulsory purchase order made in 1947, served the claimants with notice to treat. In 1949 the War Damage Commission directed that the appropriate compensation payable under the War Damage Act, 1943, in respect of the damage was a cost of works payment:—

* *Present*: LORD PORTER, LORD MORTON OF HENRYTON, LORD REID, LORD TUCKER and LORD ASQUITH OF BISHOPSTONE.

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Held that, the original building having been totally destroyed, "if the whole of the damage had been made good before the date "of the notice to treat," the new building would have had a different identity and would not have been subject to the Rent Restriction Acts and accordingly under section 53 (1) (a) "the value of the "interest for the purposes of compensation" must be arrived at on that basis.

Ellis & Sons Amalgamated Properties Ltd. v. Sisman [1948] 1 K.B. 653 approved.

Decision of the Court of Appeal [1951] 1 K.B. 441 reversed.

APPEAL from the Court of Appeal (Bucknill and Birkett L.JJ., Singleton L.J. dissenting).

The facts, stated by Lord Porter, were as follows:—The claimants were the freeholders of two pieces of land situated in Collier Street and Killick Street in the Metropolitan Borough of Finsbury in the County of London. The portion of the land with which this appeal was concerned was the site of certain dwellings for the working classes known as Winton Houses, which were completely demolished as a result of enemy action on June 24, 1944. None of the war damage had been made good at the date of the notice to treat hereafter referred to.

Winton Houses, before the occurrence of the war damage, comprised 55 working-class dwellings, and when it occurred all these 55 dwellings were let to and occupied by weekly tenants at rentals at or below the statutory limits laid down by the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939. There were no written tenancy agreements. All the dwellings were, by reason of their rateable values on April 6, 1939, subject to the provisions of the Acts, and were indeed the subject of old control. Of the above mentioned 55 tenancies, 42 were statutory tenancies and 13 were contractual tenancies, but it was agreed between the parties that this diversity was irrelevant to the question to be determined, and that the matter might be treated as one in which all the dwellings were the subject of statutory tenancies.

On December 6, 1947, the Minister of Health confirmed a compulsory purchase order by which the Finsbury Corporation were to acquire the land on which the dwellings had been built, and on July 28, 1948, the corporation served a notice to treat on the claimants. Subsequently, by a determination made on May 9, 1949, the War Damage Commission directed that the appropriate payment under the War Damage Act, 1943, in respect of the war damage would, apart from the compulsory purchase order, be a payment of cost of works. In these circumstances

an official arbitrator was appointed to assess the compensation payable to the claimants and in fulfilling his functions made the following award on February 14, 1950: "I assess the compensation payable in respect of the said land on the assumption that, if the whole of the said war damage had been made good before the date of the said notice to treat, the rents legally recoverable in respect of the said dwellings would not be subject to the statutory limits imposed by the Rent and Mortgage Interest Restriction Acts, 1920 to 1939, at the sum of £32,000-0-0 (Thirty-two thousand pounds)." In making his award the official arbitrator did not state what sum he would have given if he had assumed that the rent of destroyed dwellings if made good would be subject to control under the Rent Restriction Acts, but it was agreed that in those circumstances the figure which he would have awarded would have been £20,000.

By an order dated February 14, 1950, Devlin J. upheld the arbitrator's award. By an order dated October 20, 1950, the Court of Appeal reversed his decision. The claimants appealed to the House of Lords.

Rowe K.C. and *Squibb* for the appellant company. This case has proceeded on the basis that all the tenancies are to be treated as statutory tenancies. On the true construction of section 53 (1) (a) of the Town and Country Planning Act, 1947, the interest to be acquired must be valued as though the damage had in fact been made good before the notice to treat. That section does not require that the fact of there having been war damage and the consequences which flow from it must be ignored. It ties together with section 51 (1). It requires one to imagine that the owner has been allowed to reinstate his property on the basis of a cost of works payment, and its value depends on what it would command in the open market. All that the subsection says is that one is to assume a notional rebuilding; the other facts to be considered are those which actually exist. Accordingly it does not require the basis of compensation to be the value of the property before the war damage was suffered. On the view that the building was re-erected before the notice to treat, the modification of the ordinary market value rule made by section 53 would be comparatively small. An ordinary purchaser would have acquired and paid for the site and the right to have a building put up on it free of cost to himself, while the local authority would pay as if that building had already been completed.

The Court of Appeal were wrong in that they held that not

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only was the physical building to be taken as notionally made good but that the incidents attaching to the old building were to be notionally restored as if the damage had never happened. Thus they assumed that the measure of the value of the property was to be its condition before the damage was suffered. They gave no weight to the basic principle that the market value is to be the measure of compensation, and that in the open market the owners would have obtained a price for the land on the basis that it was capable of being used for flats which would attract a new rent. If the damage had been made good before the date of the notice to treat the dwelling would have been uncontrolled by the Rent Restriction Acts. This is the case where a cost of works payment is appropriate, and the building has been totally destroyed and none of the damage "made good." These words in section 53 (1) (a) of the Act of 1947, as in sections 6 and 8 of the War Damage Act, 1943, cover the rebuilding of a completely demolished building. There is no statutory obligation to follow the lines of the old structure: see section 51 (2) and Sch. III of the Act of 1947 and section 8 of the Act of 1943. The law relating to war damage has developed so as to give greater latitude to owners of damaged property and to induce them to rebuild houses of the same type, but not necessarily subject to the same limitations. Here the new building would not have been identical with the old one in structure; even if it was an identical reproduction it would be a different building not subject to the old incidents: see *Ellis & Sons Amalgamated Properties Ltd. v. Sisman*.¹

The local authority assert the physical rebirth of the old building, producing the effect that the ghost of the Rent Restriction Acts which was hovering over the empty site returns to the body on the rebuilding. But rebuilding a building destroyed by war damage does not produce effects of this description. For example, to reinstate such a building would not revive a lease which had been disclaimed. Since the identity of such a house is lost, the Rent Restriction Acts cease to apply to it. Where a house is merely damaged and rendered uninhabitable it may not have lost its identity, but that is not the case here. After the bomb fell on this property there was no longer any dwelling-house left to which the Acts could apply. As an example of identity, when the Inner Temple Hall has been rebuilt the war damage will have been made good, although it will be a new hall.

¹ [1948] 1 K.B. 653.

The rules for determining payments in respect of war damage under the War Damage Act, 1943, and the conditions governing them, are different from and irrelevant to the provisions of the Act of 1947 for determining compensation on a compulsory purchase. It is wrong to speak of payments made under the former as compensation for war damage; they differ from compensation in many important respects. The policy of that Act was that a building which was worth reinstating should be rebuilt in the public interest, while in respect of others payment should be made on the basis of 1939 values.

Section 57 of the Town and Country Planning Act, 1944, which provided for the assessment of the value interests in land by reference to 1939 values, was repealed by section 50 of the Act of 1947, section 51 of which substituted assessment in accordance with the provisions of the Acquisition of Land (Assessment of Compensation) Act, 1919, viz., current market value in place of 1939 values: see section 2 (2) and (5) of the Act of 1919. Thus the owners of war-damaged property which has not been repaired are put on an equality with persons whose property, which has not been damaged, is compulsorily acquired. Current prices are restored as the starting point for compensation. Market value will be affected according as the property is or is not subject to the Rent Restriction Acts. There is a differentiation between the state of the hereditament at any particular time and the incidents attaching to the property. [They referred to *Ellis & Sons Amalgamated Properties Ltd. v. Sisman*,² *Phillips v. Barnet*,³ *Denman v. Brise*,⁴ *Langford Property Co. Ltd. v. Batten*,⁵ and the War Damage Act, 1943, ss. 6, 9, 10, 12, 14 and 20, and Sch. II.]

Squibb following. The standard rent is only relevant in the case of houses to which the Rent Restriction Acts apply and they do not apply to houses provided by local authorities such as the dwellings which the local authority in the present case intend to erect. Accordingly nothing in the Landlord and Tenant (Rent Control) Act, 1949, can limit the rent chargeable by them and compensation must be assessed on this basis.

Lawrence K.C. and *Harold Brown* for the respondents. The majority of the Court of Appeal were right in holding that the assumption of the arbitrator in assessing the compensation was erroneous, and his assessment was arrived at on a wrong basis. On the true construction of the material words of section 53 (1) (a)

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of the Act of 1947 it is necessary for the arbitrator to envisage the hereditament made good in the state in which it was immediately before the damage occurred. The section does not require him to imagine that the payment has been spent on erecting a new building; he is to imagine the old building put back exactly as it was before. One is here dealing with a compensation Act and it is not new for compensation to be assessed on an artificial hypothesis, for it is rarely equivalent to an indemnity. The section lays down the hypothesis which must always be before the arbitrator's mind. The basis it postulates is entirely hypothetical and not actual. No actual existent house is to be envisaged. There is to be brought into imaginary existence a hypothetical house having all the qualities of the one destroyed. The facts which bring the case within the section are that the hereditament has sustained war damage, which has not been made good at the date of the notice to treat, and that the appropriate payment to the owners has already been determined to be a cost of works payment. It is the owner's interest in that hereditament which is required to be assessed. The hypothesis in section 53 (1) (a) is that the damage has been made good immediately before the notice to treat was served and not that a different or a new building has been erected in place of the one destroyed. If the appellants were right the result would be a totally new building, not merely the making good of the damage. One is always considering the single conception of damage. The hypothesis is limited to having regard to the damage to the hereditament and it is wrong to depart from the hypothesis and consider the implications of an actual state of affairs. Within the confines of the hypothesis there is room for an infinite multiplicity of variables, but throughout the inquiry it remains a hypothesis, and the result is a notional state of affairs.

On a review of the relevant legislation one conception governs the whole matter—damage to a developed hereditament capable of being made good in such a way that the owner is finally left with what he had before and not with something different. The principle of the War Damage Act, 1943, was to compensate the owner of property suffering war damage for his loss and not to give him any financial advantage in excess of the amount representing that loss. The intention was to put the owner in the same position as if the former building had not been destroyed, to give him what he had before the bomb fell. The principle of compensation laid down in that Act is invoked by section 53 (1) of the Act of 1947.

Damage to a building does not necessarily amount to total destruction, and this fact reinforces the argument that the notional result under the statutory hypothesis must be linked with the conception of the continued existence of the hereditament. On the mere breaking of windows or the removal of the roof its identity is not lost. The expressions "making good" and "made good" appear in section 6 of the Act of 1943. The same wording is used in connexion both with wholly and partially destroyed property. Whatever was being envisaged by section 6 it could not have been reinstatement with the same actual materials but the conception remains that what is being paid for by a cost of works payment is repair of damage and not the creation of a new entity: see the interpretation of "making good" in section 123 of the Act of 1943. It is a well-chosen expression because it connotes the nature of something which can be made good. "Making good" covers the situation where there has been complete demolition of the hereditament, and here too the notion persists of something which when made good has not lost its identity and reinstatement in its previous form is contemplated.

As to the position with regard to the compulsory purchase of war damaged property before the Act of 1947 came into force, see section 14 of the Act of 1943, under which there was no question of a notional conception. Section 50 (1) of the Act of 1947 abolished the 1939 standard for compensation on compulsory acquisition of land, and section 51 (1) substituted assessment in accordance with the provisions of the Acquisition of Land (Assessment of Compensation) Act, 1919, thereby reinstating the traditional open market value at current prices. Compensation for the compulsory acquisition of land attracting converted value payments under the Act of 1943 is dealt with in section 53. By section 53 (1) (b) the right to receive the value payment becomes vested in the acquiring authority, which only receives the value payment under section 14 of the Act of 1943 which would have been paid to the owner. By section 53 (4) the amount of that payment must not exceed the sum paid by way of compensation in respect of the interest acquired. The effect of the appellants' argument would be to compel the respondents to pay them more than they would themselves receive from the War Damage Commission, and this is relevant to the construction of section 53 (1) (a) since it is impossible that their outgoings and their receipts would be calculated on a different basis. Thus on the appellants' contention if the Act of 1947 has improved the owner's position,

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this has been done at the expense of the acquiring authority since the value payment remains the same as before. But the legislature cannot have intended the new basis of compensation to operate in a way producing a lack of balance between the person to be compensated and the acquiring authority.

The policy of the legislature was to compensate the owner of land for what he actually lost. All that a claimant is entitled to receive is the value of the totality which he had before the first of the two events, giving rise to the compensation, overtook him, the first being the war damage and the second the compulsory purchase. Here the £20,000 represents two constituent parts: (a) the value of the site, and (b) the value of the damaged building notionally made good in the sense that it was the old building with all its disabilities. The sum represented the value of the site with the block of buildings as it was before the bomb fell, retaining its old identity so that its restoration is not merely physical. The appellants' interpretation of section 53 produces a result irreconcilable with the policy and general scheme of the Acts of 1943 and 1947. If possible the words should be given a meaning more harmonious with the rest of the legislation.

The value of the notional building must be assessed on the basis that it is restricted in its rent-earning capacity by the Rent Restriction Acts. Under section 53 one of the limitations of the building "made good" (which must be substantially identical with the one destroyed) was the control imposed on the former building by those Acts. The various aspects of the building cannot be split up, for it is a single entity which must be regarded as a whole, physical and economic.

If the house subject to rent control had been partly destroyed, its restoration or making good its hypothetical identity would not have been changed, though, to some extent, its physical substance would have changed, and it would have retained all its previous advantages and disadvantages, remaining subject to rent control. The same is true of a house wholly destroyed, otherwise the owner of a house totally demolished, for which the appropriate compensation was a cost of works payment, would be in a better position than the owner of a house partially destroyed, since the former would get the value of a house free from control and the latter would get compensation on the basis of a house subject to control. The type of total loss in question is not a physical one for which a value payment is the proper compensation. A cost of works payment is only justified in a case of total destruction where there is an economic loss (see section 7 (2) of the Act of 1943),

and therefore the owner merits compensation for that loss and not payment for the physical value of a new house free from any limitation as to its use.

The notional basis of compensation does not necessarily import an anomaly (if it be an anomaly) on the facts in *Ellis & Sons Amalgamated Properties Ltd. v. Sisman*,⁶ which contemplated an actual state of affairs and not a notional state of affairs such as is contemplated in section 53 (1). Therefore that case is irrelevant and inapplicable and the respondents can succeed without challenging its correctness. The question whether a house is controlled by the Rent Restriction Acts is different from the question of the compensation payable. This depends on different considerations—the terms and the object of the legislation under which the compensation is payable. One is not there dealing with a particularized state of facts as in *Ellis & Sons Amalgamated Properties Ltd. v. Sisman*,⁶ but with a comprehensive scheme. If necessary the respondents challenge the correctness of that case in so far as it decides that if a building subject to the Rent Restriction Acts is demolished, at any rate to the extent only of its residential accommodation, any building which is a reinstatement of the former building is not subject to the limitations imposed on the former building by the Acts. A dwelling-house is one and land which has formed part of that whole is part of the dwelling-house: see section 3 (3) of the Rent and Mortgage Interest Restrictions Act, 1939. In *Phillips v. Barnett*⁷ the observations relied on by the appellants are obiter and do not indicate that the final position in *Ellis & Sons Amalgamated Properties Ltd. v. Sisman*⁸ was supported by a long line of authority. *Morleys (Birmingham) Ltd. v. Slater*⁹ indicates that the test is not habitability but whether the identity was destroyed. [They also referred to the Town and Country Planning Act, 1944, s. 57, and to the War Damage (Increase of Value Payments) Order, 1947 (S.R. & O., 1947, No. 390).]

Sir Lynn Ungood-Thomas S.-G. and *John Ashworth* attended as amici curiae.

Rowe K.C. in reply. The respondents' argument related more to what Parliament might have done than to what it actually did do. The principle laid down by the legislature is to give the owner what he would have if the war damage were made good. One may contrast section 53 of the Act of 1947 with section 7 and Sch. II of the Act of 1943. One must consider the circumstances

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⁶ [1948] 1 K.B. 653.

⁸ [1948] 1 K.B. 653.

⁷ [1922] 1 K.B. 222, 225–6.

⁹ [1950] 1 K.B. 506.

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as they would stand if there had been a rebuilding in fact. The object of a cost of works payment is to preserve the function of the building but not necessarily its identity. These are different conceptions. When the mantle of Elijah fell on Elisha the latter continued to perform the same function but his identity was different.

Their Lordships took time for consideration.

July 25. LORD PORTER. My Lords, the appellants maintain that the award is correct and that they are entitled to receive £32,000 as compensation for the damage they have suffered. In substantiation of this claim they rely on section 53 of the Town and Country Planning Act, 1947. The relevant wording is that contained in subsection (1) (a) and is as follows: "The value of "the interest for the purposes of the compensation payable in "respect of the compulsory purchase shall, subject to the provi- "sions of this section, be taken to be the value which it would "have if the whole of the damage had been made good before "the date of the notice to treat."

There is no dispute as to the applicability of the section but its construction is the subject of acute controversy. The appellants say that if the damage had been made good before the compulsory acquisition they would have had a block of flats free from any control imposed by the provisions of the Rent Acts notwithstanding that before their destruction the premises were thus controlled. They would have erected, they say, a new building, which would not necessarily have been identical with the old, but even if no change had been made the case of *Ellis & Sons Amalgamated Properties Ltd. v. Sisman*¹⁰ is an authority for the proposition that a house erected upon the old site may be identical in structure to, but is a different building from, that previously standing on the site and therefore not subject to the same incidents as the old.

But, they add, the relevant sections of the Act of 1947 and other material Acts do not compel them slavishly to follow the lines of the old structure. They can alter its form, at any rate if they do not make too great a change. Moreover the whole development of the law relating to war damage shows, they maintain, an increasing tenderness for the owner of the damaged property and a desire to induce him to rebuild a house of the same type, but not necessarily subject to the same limitations.

¹⁰ [1948] 1 K.B. 653.

They point out that section 57 of the Town and Country Planning Act, 1944 (which provided for the assessment of the value interests in land by reference to 1939 values), was repealed by section 50 of the Act of 1947, that section 51 of the latter Act substituted assessment in accordance with the provisions of the Acquisition of Land (Assessment of Compensation) Act, 1919—i.e., current market value—in place of 1939 values, that subsection (2) of that section and Sch. III permit an increase of the building by one-tenth and in the smaller buildings possibly more, and that section 8 of the Act of 1943 contemplates the making of alterations and additions to and in certain cases omissions from the reconstructed building of features which were to be found in the former building and provides for appropriate variation in the compensation payable in respect of the altered edifice. As a result of these provisions the appellants submit that in a case where a cost of works payment is the appropriate payment under the War Damage Act, 1943 (as it is in this case), and where a building has been totally destroyed and none of the damage has been made good, then the value of their interest in the destroyed property for the purposes of compensation in the case of compulsory purchase is to be taken to be the value which it would have had if the whole of the damage had been made good. That value, they say, would be the value of a building free from control.

This contention was resisted by the respondents for a number of reasons. They maintained in the first place that by the wording of the section the sum payable was to be determined by the value of the building when “made good” and this expression connoted the re-erection of a building substantially identical with that destroyed, with all its incidents and limitation of value, and one incident or limitation was the control imposed upon the former building by the Rent Restriction Acts. The purpose of the relevant sections was, they said, to put the owner in the same position as if the former building had never been destroyed. You cannot, it was urged, split up the various aspects of a building: it must be regarded as a whole, with all its qualities, physical and economic, composing one entity.

*Ellis & Sons Amalgamated Properties Ltd. v. Sisman*¹⁰ is, they maintain, inapplicable. Whether a house is controlled by the Rent Acts is one thing, the compensation to be paid is another and depends on different considerations, viz., the phraseology and apparent object of the Acts under which compensation is to be

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obtained. No actual existent house is to be envisaged: a hypothetical house alone is to be brought into imaginary existence and that hypothetical house is one possessing all the qualities which the war-damaged house possessed. The same wording is used whether the house is wholly or partially destroyed. If it had been partially destroyed it would have been restored or, to use the phrase employed in the Act, "made good," and such making good would have left the house with all its previous advantages and disadvantages, subject of course to the owner receiving new materials for old, an incident which there was no method of avoiding: its hypothetical identity remains unchanged though its physical substance might alter. To decide otherwise, it is suggested, would be to put the owner of a wholly destroyed house, for which the appropriate compensation is a cost of works payment, into a better position than that enjoyed by an owner of a partially destroyed house, provided both houses had been the subject of rent control before they suffered war damage: the former would receive the value of a house free from control, whereas the latter would at best recover the value which a house subject to control would justify. This type of total loss, they add, is not a physical one for which a value payment is the appropriate compensation; a cost of works payment is only justified in case of total destruction where there is an economic loss (see section 7 (2) of the Act of 1943), and as such merits compensation for that loss and not payment for the physical value of a new house free from any limitation on its use.

Finally they say that to adopt the appellants' argument would have the result of compelling them to pay to the claimant more than they would receive from the War Damage Commission, whereas under the terms of section 53 (4) of the Act of 1947 they are forbidden to receive more than they have to pay. This circumstance, they argue, should be taken into consideration when the construction of section 53 (1) (a) is in question. It would be unlikely, so it is contended, that their expenditure and receipt should be calculated on a different basis. This consequence, they submit, follows from the provision contained in section 51 (1) (b), which enacts: "The right to receive any value payment or share
 " of a value payment which, under the War Damage Act, 1943,
 " is payable in respect of the interest which is compulsorily
 " acquired (including any interest payable thereon) shall, not-
 " withstanding anything in that Act, vest in the person by whom
 " the interest is so acquired," and therefore transfers the right to compensation for the interest compulsorily acquired to the

acquiring authority. But that authority does not receive the same sum as the original owner. By section 14 (1) of the War Damage Act, 1943, it is provided: "Where the appropriate payment in respect of war damage to a hereditament would apart from this provision be a payment of cost of works, if land constituting or forming part of the hereditament, or an interest in such land, is acquired compulsorily by virtue of any enactment, whether passed before or after the passing of this Act, or is acquired by agreement by a person authorized by virtue of any such enactment to acquire it compulsorily, then, notwithstanding any previous determination of the kind of payment to be made in respect of the damage to the hereditament, (a) the Commission shall make a payment or payments in respect thereof as follows, that is to say, in respect of the damage so far as made good before the date of the acquisition, a payment of cost of works, and, in respect of the damage so far as not made good before that date, a value payment. . . ."

My Lords, I do not stay to discover what that value payment would amount to or consist of or upon what principle it is computed. It is enough to record that it is a value payment and not a cost of works payment, and in the ordinary course would be a lesser sum.

In the case under consideration no making good of the damage has taken place and therefore the respondents as owners are entitled only to the value payment which is declared in section 10 (1) of the Act of 1943 to be "an amount equal to the amount of the depreciation in the value of the hereditament caused by the war damage." In the present instance the depreciation in the value of the land compulsorily acquired was the loss of a controlled house and therefore at best the respondents would receive as compensation the difference between the value of the land with a controlled house upon it and that land with no building upon it.

To this extent therefore the respondents are right in saying that if the appellants' contention prevails they will receive a sum less than that which they will have to pay, and that circumstance would be an element which might influence the construction of section 53 of the Act of 1947 if that section were doubtful or ambiguous. But, my Lords, the primary duty of a tribunal is to construe the section, and if, upon the reading of its terms, it bears in its wording a plain meaning, the fact that an unexpected result is occasioned is no reason for rejecting the obvious meaning

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and substituting something which might be conceived to be that which Parliament would be more likely to intend to bring about.

But in the present case I am by no means sure what that intention was or that the result is unexpected. It is quite conceivable that the extra expense was imposed upon the local authority because it was felt that that body, not being subjected to rent control, should not have the advantage which the private owner obtained and that it did not require the incentive to build which it was desirable for the latter to have. In any case one can only speculate as to what the intention of Parliament was, and I do not think that your Lordships would be justified in speculating. As Mr. Rowe pointed out, the argument concerns itself with what it is suggested ought to have been done rather than what the words of the Act mean: it is not so much an allegation that the construction contended for by the appellant is unreasonable as that the provisions of the Act are unreasonable and therefore should be construed in a way consonant with what Parliament might be thought to intend. If what had been intended was to give the owner the value of his property as it existed before the war damage was done, the intention would have been easy to express by substituting the words "the value which the interest would have had if the damage had not been done" for the words of the Act, viz., "the value which it would have if the whole of the damage had been made good," and indeed section 10 of the Act of 1943 makes it clear that where the pre-damage value is intended to be given, apt phraseology had already been employed to produce that result. Nor does it make the use of that language in section 10 of less weight to point out that it is there used of a value, and not of a cost of works, payment. The wording had already been employed to express pre-damage value where pre-damage value was intended to be given as compensation, and could have been used in the case of a cost of works payment where it was desired to produce a similar result.

The real strength of the respondents' argument depends upon their ability to establish the contention that "make good" means restore to the former physical state with all its incidents and limitation of value. But it is the damage which has to be made good, and damage is in its ordinary meaning a physical thing. It is the building and not the position of the owner which has to be restored. What may result from the "making good" of the building depends not upon any deduction which can be drawn from the use of that expression, but from the law applicable in

the case where a house originally rent-controlled is destroyed and another of a similar type is erected in its place. H. L. (B.)

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It is from this aspect that the decision in *Ellis & Sons Amalgamated Properties Ltd. v. Sisman*¹¹ takes its importance. In that case a house had been destroyed by enemy action and later on another house, identical in form to the house which formerly stood there, was erected on the same site, yet it was held that the new house was not the subject of rent control. In my view that case was rightly decided. The case now before your Lordships is a more favourable one for the landlords, since the hypothetical house postulated as having been erected need not take the same form, though it must be a dwelling-house. To that extent this is a stronger case. I find myself in general agreement with the decision of Devlin J. and would allow the appeal with costs.

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LORD MORTON OF HENRYTON. My Lords, the interest in land which has to be valued in accordance with the provisions of section 53 (1) of the Town and Country Planning Act, 1947, is the ownership in fee simple of a property known as Winton Houses. Winton Houses were completely demolished as a result of enemy action occurring on June 24, 1944; before this event happened they comprised 55 working-class dwellings and certain detached sheds. All these dwellings were subject to the provisions of the Rent and Mortgage Interest Restrictions Acts, 1920-39. By section 53 (1) (a) of the Town and Country Planning Act, 1947, the value of the interest now in question is to "be taken to be" the value which it would have if the whole of the damage had "been made good before the date of the notice to treat."

I think that the "damage" referred to in section 53 (1) (a) can only be the physical damage to the buildings, and a building which has been completely demolished can only be "made good" if it is rebuilt. If I am right so far, your Lordships have simply to consider what is the value which Winton Houses would have if they had been rebuilt before the date of the notice to treat. If they had in fact been rebuilt before that date, the appellants would have been freed from the restrictions as to rents which attached to the demolished buildings. This is the result of the decision of the Court of Appeal in *Ellis & Sons Amalgamated Properties Ltd. v. Sisman*,¹¹ with which I agree. I am therefore of opinion that the assumption on which the official arbitrator assessed the compensation payable to the appellants at £32,000

¹¹ [1948] 1 K.B. 653.

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was correct and that his award should be restored. This conclusion seems to me inevitable if the words in section 53 (1) (a) are given their literal and natural meaning.

The conclusion reached by the majority of the Court of Appeal really involves reading the words "if the whole of the damage" had been made good before the date of the notice to treat" as if they had been "if the damage had never occurred." I am unable so to read these words and I can find no context in the Act and no principle laid down in the Act, or in the earlier legislation to which our attention was directed, which would justify your Lordships in departing so far from the literal meaning of the words in question. On the contrary, a comparison of the wording of section 53 (1) (a) with the wording of section 56 (2) confirms me in the view which I have just expressed.

I would allow the appeal.

LORD REID.—My Lords, 55 dwellings which belonged to the appellants were completely demolished by enemy action on June 24, 1944, and all that remained of the appellants' property was the bare site of these dwellings. The appellants' property was still in that condition when it was compulsorily acquired by the respondents, the local authority, the notice to treat being dated July 28, 1948. The question in this case is what is the proper measure of the compensation to be paid by the respondents to the appellants. The statutory provisions which now govern that matter are those of Part V of the Town and Country Planning Act, 1947, which I shall refer to as the Act of 1947. Section 51 (1) of that Act enacts that such compensation shall be assessed in accordance with the provisions of the Acquisition of Land (Assessment of Compensation) Act, 1919, as modified by the provisions of that section and the next three following sections. Under section 2 (2) of the Act of 1919 the value of land is to be taken, subject to provisions which would not apply in this case, "to be the amount which the land if sold in the open market by "a willing seller might be expected to realize." In this case the market value of the appellants' property was not merely the value of the site. It has been determined by the War Damage Commission that the appropriate payment under the War Damage Act, 1943 (which I shall refer to as the Act of 1943), in respect of the war damage to the appellants' property would, apart from the compulsory purchase, be a payment of cost of works. That means that, if the appellants' property had not been taken by the respondents, the appellants, on erecting a new building to

make good the war damage, would have been paid the cost of that building in terms of section 8 of the Act of 1943, and, if the appellants had sold their property before rebuilding, the right to recover the cost of works payment would have passed to the purchaser (provided that the purchaser was not an authority entitled to acquire the property compulsorily). So in effect the purchaser would have acquired not only the site but also the right to get a new building without cost to himself, and therefore the market value must have included both the value of the site and the value of that right. The question, then, is to what extent the appellants' right to obtain that market value for their property under the Act of 1919 has been modified or altered by section 51 of the Act of 1947 or any of the three sections therein referred to. The only one of these sections which applies in this case is section 53, and the present case depends on the proper interpretation of the provisions of that section.

Section 53 of the Act of 1947 provides: “ (1) Where an interest “ in land the value of which is to be ascertained in accordance “ with the provisions of section 51 of this Act is an interest in “ a hereditament or part of a hereditament which has sustained “ war damage, and any of that damage has not been made good “ at the date of the notice to treat, then if the appropriate pay- “ ment under the War Damage Act, 1943, would, apart from the “ compulsory purchase or apart from any direction given by the “ Treasury under paragraph (b) of subsection (2) of section 20 of “ that Act, be a payment of cost of works—(a) the value of the “ interest for the purposes of the compensation payable in respect “ of the compulsory purchase shall, subject to the provisions of “ this section, be taken to be the value which it would have if “ the whole of the damage had been made good before the date “ of the notice to treat; and (b) the right to receive any value “ payment or share of a value payment which, under the War “ Damage Act, 1943, is payable in respect of the interest which is “ compulsorily acquired (including any interest payable thereon) “ shall, notwithstanding anything in that Act, vest in the person “ by whom the interest is so acquired.”

The important words in the subsection are that the value shall “ be taken to be the value which it would have if the whole of “ the damage had been made good before the date of the notice “ to treat.” The appellants say that this means that we are to suppose that the building which they were entitled to have erected with the cost of works payment had been erected before the date of the notice to treat. On that view the modification of the

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ordinary market value rule made by section 53 would be comparatively small. An ordinary purchaser would have got and would have paid for the site and the right to have a building erected on it free of cost to himself, whereas the local authority would pay as if that building had already been completed. But if the respondents' contention is right, then section 53 has drastically altered the ordinary market value rule. They say that section 53 does not require us to suppose that the cost of works payment has already been spent in a new building, but that it requires us to imagine that in some way the old building which was destroyed has been put back exactly as it was before it was destroyed, or, as Bucknill L.J. put it,¹² that "the words of section 53 . . . "postulate the continued existence of the old building." In effect they wish to rewrite the subsection by substituting for the words which I have quoted some such words as that the value shall "be taken to be the value which it would have had at the "date of the notice to treat if it had not sustained the damage." On that view the appellants would not be compensated by the acquiring authority for what in fact they owned at the date of the notice to treat, but for what they would or might then have owned if there had been no war damage.

It is not disputed that the appellants' interpretation of the words of section 53 is the more natural; but the respondents contend that this interpretation produces a result which cannot be reconciled with the policy and general scheme of the Acts of 1943 and 1947, and therefore Parliament cannot have so intended; so if it is possible to construe the words in some other sense and produce a result more in line with the rest of the Act, that construction should prevail. To appreciate this argument it is necessary to make a fairly wide examination of the Acts to see whether there is any general scheme or principle with which the natural interpretation of section 53 would conflict. The respondents' contention is that the intention of the Acts is to give to every owner of damaged property what he had before the bomb fell, and therefore the intention of section 53 must have been that the acquiring authority should pay that and no more. This contention was accepted by the majority of the Court of Appeal. Bucknill L.J. said ¹²: "It seems to me that the cardinal principle "of the War Damage Act, 1943, was to compensate the loser by "war damage for what he has actually lost; to give him no more "and no less. Whether he receives what is called in the Act a

¹² [1951] 1 K.B. 441, 446.

“cost of works payment, or what is called in the Act a value payment, this principle is applicable in every case.”

My Lords, I cannot find in the Act any such equality of treatment of those who on the one hand get a cost of works payment and on the other hand get a value payment. The owner who gets a cost of works payment is repaid the cost of making good the damage and, where the old building has been wholly or almost wholly destroyed, in effect he gets a new building to replace the old. But the recipient of a value payment is in a very different position. He gets a sum of money determined by 1939 values, and this may be very different from the value of a new building. There is no clearcut distinction between those cases which get a cost of works payment and those cases which get a value payment, and in many cases it is not easy to say which is the appropriate form of payment under the Acts. The rule is that a value payment is appropriate where there is a “total loss.” But whether or not there has been a total loss is not determined by the physical condition of the damaged property: section 7 of the Act of 1943 makes this question depend on a comparison of valuations made at prices current at March 31, 1939. And then there are further provisions which enable the general rule to be varied in certain cases—for instance, section 20 (2) (b) enables a value payment to be made where under the general rule a cost of works payment would be appropriate. No doubt there were good reasons, in the difficult and uncertain situation of the time, for creating this disparity of treatment; but it seems to me impossible to doubt that this was created deliberately, for the fact that the provisions of the Act of 1943 might create such disparity was recognized in the Act itself. Section 11 gave authority to increase the amounts of value payments if it appeared, when the discharge of value payments generally or in substantial volume became permissible, that the amounts computed under the Act were inadequate. By virtue of this authority the War Damage (Increase of Value Payments) Order, 1947 (S.R. & O., 1947, No. 390), increased value payments generally by certain percentages; for this class of case the increase was 60 per cent. But that increase was a fixed increase irrespective of the circumstances of a particular case. It is notorious that some kinds of buildings have increased very much in value since 1939, whereas other kinds of buildings have shown little increase of value since that date and may even have shown a decrease. But in every case the value payment still depends on 1939 value plus 60 per cent. So if the building destroyed was of a kind which has greatly increased in value, it

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is very much to the advantage of the owner to get a cost of works payment, whereas, if the building was of a kind which had not increased in value, the owner may be better off with a value payment.

I turn now to the provisions of the Acts which deal with the acquisition of damaged property by public authorities. If the case is one for which a value payment is appropriate the position is simple. The original owner keeps the value payment and the acquiring authority pays for the property in its actual condition at the time of acquisition. The acquisition does not affect the compensation for war damage. But the position is more difficult if the property is one for which the appropriate payment would have been a cost of works payment if there had been no acquisition. I have stated that when an ordinary purchaser acquires damaged property, he also acquires a right to the cost of works payment, but for some reason that does not apply when the purchaser is a public authority which can acquire the property compulsorily. The public authority does not get a cost of works payment even if it carries out works which would attract the cost of works payment if they had been carried out by a private purchaser. What happened under section 14 of the Act of 1943 was that in effect the acquisition changed the case from a cost of works case to a value payment case. The owner got no compensation for this change, but the Treasury got the benefit of any difference between the amounts of the cost of works payment which would have been payable but for the acquisition and the value payment which became payable consequent on the acquisition. The owner had been entitled before the acquisition to get a new building, and he was not compensated for the loss of that right; he was not compensated by the acquiring authority because that authority only paid for the property in its damaged state, and he was not compensated otherwise because all he could now get was a value payment, which, as I have said, might be much less valuable than the right to a cost of works payment. It was in those circumstances that section 53 of the Act of 1947 was enacted.

In 1947 considerable benefits were conferred on other owners of damaged property who did not receive cost of works payments, and it seems probable that section 53 of the Act of 1947 was intended to improve the position of owners who lost their cost of works payments and would only have become entitled to receive value payments under section 14 (1) (a) of the Act of 1943. If the appellants' interpretation of section 53 is correct, that section

does confer a benefit on such owners; instead of the value payment under section 14 it gives to them rights which are as nearly as possible equivalent financially to what they would have had if their property had not been taken. Such an owner, instead of getting a new building by means of a cost of works payment, is paid what the new building would have been worth. But if the respondents' interpretation is correct, the dispossessed owner gets neither the equivalent of a cost of works payment nor the equivalent of a value payment. What he gets is not the equivalent of a cost of works payment because the payment to him is calculated as if the old building had survived and not as if the new building had been erected, and it is not the equivalent of a value payment because a value payment is based on 1939 values with the addition of 60 per cent., whereas this payment would be based on the value which the old building would now have had without any addition. If the old building would have been worth no more now than it was in 1939, the sum payable under section 53 would be much less than the value payment which the owner would have received if the War Damage Commission had originally decided that the case was one for a value payment and not for a cost of works payment. I find it difficult to suppose that Parliament intended that a decision that the owner was entitled to a cost of works payment should in the end give him less than he would have got if the original decision had been that his property was a total loss and that the appropriate payment was a value payment. I therefore think that the interpretation of section 53 for which the appellants contend is not only the more natural interpretation of the words of the section but is also more in accord with the apparent scheme of the Act than is the respondents' interpretation.

It was pointed out that, if this is right, acquiring authorities will suffer hardship because they will have in many cases to pay to the owner more than the value of the property which they acquire plus the sum which they get from the Treasury. Under section 53 (1) (b) the acquiring authority only receives the value payment which under section 14 of the Act of 1943 would have been paid to the owner. So if the Act of 1947 has improved the position of the owner, it has done so at the expense of the acquiring authority, because the sum payable by the Treasury as a value payment remains the same as before. But this could happen even if the respondents' contention were correct. The respondents say that the acquiring authority is bound under section 53 to pay to the owner what the original property would

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have been worth now if it had still been in existence, and that might well be considerably more than the value of the site plus the value payment. The value payment is based on 160 per cent. of the pre-war value of the original property, and many classes of buildings are today worth more than 160 per cent. of their pre-war value. So I cannot regard the argument based on hardship to the acquiring authority as a very strong one. On any interpretation of section 53 such hardship is inevitable in some cases and the most that can be said is that it may occur more often if the appellants' contention is right.

In the present case the difference between the sum which the appellants will receive if they are right and the sum which they would receive if the respondents were right is large. The former sum is £32,000 and the latter £20,000. But that difference is largely due to the effect of the provisions of the Rent Acts. If the respondents were right, and the sum which they have to pay were assessed on the footing that the old 55 dwellings which were destroyed must be supposed still to exist, then, of course, the old standard rents for these dwellings would also have to be supposed still to exist. But if the appellants are right, and it must be supposed that a new building has been erected, then in my opinion it cannot be supposed that the old standard rents would apply to it. In the first place there is no obligation to use a cost of works payment to erect a building which is an exact copy of the destroyed building, and it might well be that present-day requirements would compel the new building to be built on a different plan from the old, so that none of the new dwellings could be identified as corresponding with any of the destroyed dwellings. And, even if it is to be supposed that the new building would correspond exactly with the old, I agree with your Lordships that that would not mean that the old standard rents survive. The appellants would have been entitled to let the new dwellings at higher rents, and it is for that reason that the capital value of the new building which we are required to suppose had been erected so largely exceeds the value which the old building would have had if it had survived. I agree that the appeal should be allowed.

LORD TUCKER. My Lords, if *Ellis & Sons Amalgamated Properties Ltd. v. Sisman*,¹³ so far at any rate as relevant for present purposes, was rightly decided, it follows, I think, that this appeal must succeed. As I understand your Lordships to

¹³ [1948] 1 K.B. 653.

agree with that decision and as I remain of the same opinion I do not desire to add anything to what I said in that case. This case then turns on the meaning in section 53 (1) of the Town and Country Planning Act, 1947, of the words "if the appropriate payment under the War Damage Act, 1943, would, apart from the compulsory purchase . . . be a payment of cost of works— (a) the value of the interest acquired shall . . . be taken to be the value which it would have if the whole of the damage had been made good before the date of the notice to treat." It is not disputed that in the events that occurred the appropriate payment would have been a cost of works payment and the only question is what would have been the value of the appellants' interest in the hereditament if the whole of the damage had been made good before the date of the notice to treat.

As Devlin J. pointed out,¹⁴ "once one postulates . . . that the building was completely demolished, and . . . that the appropriate payment . . . is a cost of works payment . . . it seems to me to follow that the only 'making good' which can be meant by that provision is a rebuilding or reinstating of the old building in something . . . resembling the old form," and indeed it is clear that the words as used in the War Damage Act, 1943, include the reinstatement of a demolished building. The language seems to me unambiguous and I can find no justification for construing it otherwise than in its natural and ordinary meaning. The construction for which the respondents contend, which was accepted by the majority in the Court of Appeal, involves substituting for the language used the words "if the damage had never occurred" or "immediately before the occurrence of the damage." In this connexion it is to be observed that in section 56 (2), where the legislature desired to make the state of the land before the war damage the test, it did so in plain terms.

The Act of 1947 restored current market values as the basis of compensation and section 53 was, I think, clearly designed to put the person whose property had been damaged and not made good, and then compulsorily acquired, on equality with a similar person whose property had not been compulsorily acquired.

My Lords, I can find no justification for interpreting the words "made good" in section 53 (1) (a) as involving not only a notional physical reinstatement of the building but also a restoration of the incidents attaching to the old building or the owners' interest therein.

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¹⁴ [1950] 1 T.L.R. 1127, 1130.

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I prefer the reasoning in the judgments of Devlin J. and Singleton L.J. to that of the majority of the Court of Appeal and would allow this appeal.

LORD ASQUITH OF BISHOPSTONE. My Lords, I concur. The appeal turns on the construction of a few words in section 53 (1) (a) of the Town and Country Planning Act, 1947. If the meaning of those words were cryptic or equivocal it would no doubt be permissible to interpret them in the light of a number of extrinsic considerations, including any scheme or policy which could be spelt out of this complex of legislation; and any anomalies which might follow from one construction and be avoided by another. Counsel for the respondents in his ingenious submission not unnaturally stressed these factors more than the primary meaning of the words themselves. Yet that meaning is the logical starting point; and is in my view in this case so plain, that none of these extrinsic factors can properly be invoked to repel or qualify it.

In assessing the compensation for an expropriated interest in land the section bids the assessing authority to imagine, contrary to the fact, that the damage had been made good before the acquiring authority served notice to treat. If the damage was partial, "made good" must mean "repaired" and the original building may notionally retain its identity, including its controlled status, if controlled it was. If the damage was so extreme as wholly to destroy the original building, the notional "making good" can only mean a notional rebuilding—the substitution of a new building for the old—and cannot fail to involve (again notionally) a complete breach of identity or continuity between the two. The assessing authority is bidden in this last event to imagine a replacement of the old by a new building (an eventuality contemplated, incidentally, in the interpretation section of the Act of 1943, section 123 sub titulo "make good"). If this had actually occurred, the new building would have been lawfully lettable at any rent it could command: it would not have been tied to the standard rents of 1939: and its value, for compensation purposes, would have to be arrived at on this "untied" basis.

If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it. One of these in this case is emancipation

from the 1939 level of rents. The statute says that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs.

As some of my noble and learned friends have pointed out, if Parliament had intended the meaning contended for by the respondents, nothing would have been easier than to provide that the value should be assessed as if no war damage had occurred. Even, however, if the meaning of the words to be construed were not plain and the “ policy ” of the legislation could legitimately be invoked as an interpretative factor, I am far from subscribing to the view that the policy in question is that for which the respondents contend, or that its importation would produce the result which they desire. But it is unnecessary to develop that argument.

I agree that the appeal should be allowed. I would only add that in my judgment the rather half-hearted challenge by counsel for the respondents of the decision in *Ellis & Sons Amalgamated Properties Ltd. v. Sisman*¹⁵ fails. With respect, I am of opinion that that case was rightly decided.

Appeal allowed.

Solicitors: *George C. Carter & Co.; John Fishwick; Solicitor, Ministry of Health.*

¹⁵ [1948] 1 K.B. 653.

[HOUSE OF LORDS.]

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MOBBERLEY & PERRY LD. . . . APPELLANTS;

ANDHOLLOWAY RESPONDENT.

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July 3, 26.

Workmen's Compensation—Pneumoconiosis—Employment as miner for thirty years to October, 1946—Woodworker until May, 1949—Certification in August, 1949, as totally incapacitated from May, 1949—Claim to compensation—National Insurance (Industrial Injuries) Act, 1946 (9 & 10 Geo. 6, c. 62), s. 89 (1) (a).

* Present: LORD SIMONDS, LORD GODDARD, LORD MORTON OF HENRYTON, LORD RADCLIFFE and LORD TUCKER.

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By section 89 (1) of the National Insurance (Industrial Injuries) Act, 1946: "Workmen's compensation shall not be payable in respect of any employment on or after the appointed day" (viz., July 5, 1948) "and accordingly the" [Workmen's Compensation Acts] "are hereby repealed as from that day . . . Provided that: (a) "the said enactments shall continue to apply to cases to which they "would have applied if this Act had not been passed, being cases "where a right to compensation arises or has arisen in respect of "employment before the appointed day, except where, in the case "of a disease or injury prescribed for the purposes of Part IV of "this Act, the right does not arise before the appointed day, and "the workman, before it does arise, has been insured under this "Act against that disease or injury."

On August 29, 1949, the medical board appointed under the Silicosis and Asbestosis (Medical Arrangements) Schemes, 1931-43, certified a workman as totally incapacitated as from May 17, 1949, by pneumoconiosis (a disease prescribed for the purposes of Part IV of the Act of 1946). He claimed workmen's compensation from the employers with whom he had been engaged as a hewer in the coal industry for thirty years before October 11, 1946. From that month until May 15, 1949, he was employed in the woodworking industry and since that date he had done no work.

Held, that the workman was entitled to compensation since his case did not fall within the exception in section 89 (1) (a) of the Act of 1946 inasmuch as, though his right did not arise before the appointed day, it was common ground that before it arose he had not been insured under that Act against that disease.

Where a workman suffering from a disability is not insured under the Act of 1946 so as to obtain benefit thereunder, there are no provisions of the Act which deny him recourse to the medical board for the purpose of obtaining the proper certificate; the board has the right and the duty to perform its functions in such a case.

Harris v. Rotol Ltd. [1950] 2 K.B. 573, considered and questioned.

Decision of the Court of Appeal (sub nom. *Holloway v. Mobberley & Perry Ltd.*) [1951] 1 K.B. 316, affirmed.

APPEAL from the Court of Appeal (Bucknill, Somervell and Denning L.JJ.).

The Court of Appeal, by an order dated July 28, 1950, wholly set aside an award of His Honour Judge Langman, made in an arbitration under the Workmen's Compensation Acts, 1925 to 1943, in the Stourbridge County Court on May 18, 1950, in favour of the appellants (employers) and made an award in favour of the respondent, a workman formerly in their employment. The appellants appealed to the House of Lords.

The facts proved at the hearing of the arbitration or admitted were set out as follows in the printed case of the appellants: " (A) The respondent had for 30 years prior to October 11, 1946, "been employed by the appellants in the coal mining industry

“ as a hewer. (B) On October 14, 1946, the respondent obtained
 “ employment at the Laurence Cabinet Works, which he retained
 “ until May 15, 1949. During such employment he was engaged
 “ in stacking timber. (c) The respondent has done no work since
 “ May 15, 1949. (d) On August 29, 1949, the medical board
 “ appointed under the provisions of the Silicosis and Asbestosis
 “ (Medical Arrangements) Schemes, 1931 to 1943, certified that
 “ the respondent was totally disabled from pneumoconiosis and
 “ that such disablement commenced on May 17, 1949. (E) The
 “ respondent was totally incapacitated for work. (F) The respon-
 “ dent’s average weekly earnings during the 12 months previous
 “ to the date of his disablement were £5 10s. 0d.”

On July 26, 1946, the National Insurance (Industrial Injuries)
 Act, 1946, received the Royal Assent. July 5, 1948, was the
 “ appointed day ” for the relevant purposes of that Act.

Beney K.C. and *Eric Beresford* for the appellant employers.
Paull K.C. and *Arthur James* for the respondent workman.

Beney K.C. The Court of Appeal was wrong in holding
 the workman entitled to compensation under the Coal Mining
 Industry (Pneumoconiosis) Compensation Scheme, 1943, since
 both the date of his disablement (the development of the disease)
 and the certificate of the medical board were subsequent to
 July 5, 1948, the “ appointed day ” under the National Insurance
 (Industrial Injuries) Act, 1946. The right to compensation did
 not arise until after the “ appointed day.” Accordingly under
 section 89 (1) (a) the workman was not entitled to compensation
 since he was insured against pneumoconiosis under the new Act.

[*Paull K.C.* The appellants should not be allowed at this
 stage to raise this point not raised below. In the arbitration
 proceedings and in the Court of Appeal it was assumed that the
 respondent was not so insured, the question argued being whether
 the medical board was functus officio. On appeal to this House
 the contrary was not suggested in the appellants’ printed case. It
 is a matter for the discretion of the House whether or not they
 should be allowed to argue the matter, but they ought not to be
 heard to raise a completely new point of vital importance, par-
 ticularly when the Ministry’s interest is not represented in these
 proceedings.]

Beney K.C. Though I was reported to have been counsel in
 the court below, this was not the case. In *Hales v. Bolton*

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[LORD SIMONDS. Their Lordships are of opinion that this appeal must proceed on the footing that the respondent workman has not been insured under the Act of 1946.]

Beney K.C. The only remaining question is whether *Harris v. Rotol Ltd.*² was rightly decided. The principles there laid down are applicable to the facts of the present case and it would be wrong to distinguish it and treat it as applicable only where the workman has been insured against the disease under the Act of 1946. After the "appointed day" a right to compensation cannot arise in respect of industrial diseases since it cannot arise until the workman has obtained the certificate of the medical board, and after the "appointed day" the board has no further power to grant a certificate; it is *functus officio*, save for such purposes as those of the Pneumoconiosis (Medical Arrangements) (Transitional) Regulations, 1948 (S.I. 1948, No. 1396). There is nothing in the Act which could preserve the board's function but section 89 (1) (a), and on its true construction it does not do so.

Paull K.C. This is a case where the workman has left the industry in which he contracted the disease before the "appointed day." There are also cases where he has left all employment before that day. If the arguments for the employers are right such men get neither workmen's compensation nor insurance benefit; they are left with incurable diseases in respect of which they receive nothing. This cannot have been intended by the legislature. Nothing in the Act of 1946 deprives a workman who is not entitled to benefit under it of his right to workmen's compensation. Section 89 (1) of the Act of 1946 expressly enacts that the Workmen's Compensation Acts shall continue to apply to cases where a right to compensation arises in respect of employment before the "appointed day" save where in the case of the diseases referred to two conditions are fulfilled. In the case of this workman one of the conditions is not fulfilled: he was not insured against the disease under the Act of 1946. The guiding principles are laid down in *Hales v. Bolton Leathers Ltd.*³ *Harris v. Rotol Ltd.*⁴ is not inconsistent with the workman's claim in this case. The decision in that case was right, but the obiter dicta went too far. If the policy of the Act of 1946 had

¹ [1951] A.C. 531, 537, 541.

² [1950] 2 K.B. 573.

³ [1951] A.C. 531.

⁴ [1950] 2 K.B. 573.

been as suggested by Cohen L.J.⁵ the terms of section 89 (1) (a) would have been quite different.

Beney K.C. in reply. The medical board is functus officio because its duties have gone save in the case of recrudescence where a certificate has already been given.

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Their Lordships took time for consideration.

July 26. LORD SIMONDS. My Lords, by an order made on July 28, 1950, the Court of Appeal set aside an award of His Honour Judge Langman made in an arbitration under the Workmen's Compensation Acts, 1925 to 1943, in favour of the appellants and made an award in favour of the respondent, a workman in their employ. From that order the appellants bring the present appeal and once more your Lordships have to consider the meaning and effect of section 89 of the National Insurance (Industrial Injuries) Act, 1946, which I will call "the Act of 1946."

[His Lordship stated the facts and continued:] The arbitrator accepted the contention then and thereafter advanced by the appellants that both the date of the respondent's disablement and the date of the certificate of the medical board were subsequent to the appointed day, that the right to compensation did not arise until the certificate was given and that, before it was given, the medical board had become functus officio. In taking this course he purported to follow the earlier decision of the Court of Appeal in *Harris v. Rotol Ltd.*,⁶ which it will be necessary for the House to consider.

In the case now under appeal the Court of Appeal found it possible to distinguish *Harris v. Rotol Ltd.*⁶ on the ground that in that case the workman was, but in the present case he was not, insured under the Act of 1946. Upon this I will say something later. Your Lordships are not bound by that authority and will, I think, prefer to consider the matter afresh in the light of your recent decision in *Hales v. Bolton Leathers Ltd.*⁷

My Lords, it is not and could not be denied that the respondent would be entitled to compensation under the Workmen's Compensation Acts if the Act of 1946 had not been passed. The question is whether his right has been taken from him by section 89 of that Act. The opening words of the section are significant: "Workmen's compensation shall not be payable in

⁵ [1950] 2 K.B. 573, 577.

⁷ [1951] A.C. 531.

⁶ [1950] 2 K.B. 573.

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“respect of any employment on or after the appointed day.” Here the words “on or after the appointed day” qualify the word “employment.” At once the dividing line appears between employment before and after the appointed day and the way is prepared for different treatment if incapacity arises from one or the other. But it was plain that incapacity after the appointed day might be the result of employment before it. Accordingly it was necessary to provide by means of a proviso for such a case. This is done in clear enough terms by its opening words: the enactments, i.e., the Workmen’s Compensation Acts, are to continue to apply to cases “where a right to compensation arises or “has arisen in respect of employment before the appointed day.” Again the words “before the appointed day” qualify “employment.” But to this proviso there is an exception, necessitated, as was pointed out in *Hales v. Bolton Leathers Ltd.*,⁸ by the nature of the subject-matter. The right to compensation in the case of a disease or injury prescribed for the purposes of Pt. IV of the Act, even where it is in respect of employment before the appointed day, is taken away, if, but only if, two conditions are satisfied, (a) that the right to compensation “does not arise “before the appointed day,” and (b) that “the workman, before “it does arise, has been insured under this Act against that “disease.” The emphasis lies on *that* disease. I am in effect repeating what my noble and learned friend Lord Normand said in *Hales v. Bolton Leathers Ltd.*⁸ for the purpose of applying his words to the present case. So applying them, I see no valid answer to the respondent’s claim. He was admittedly disabled by pneumoconiosis due to employment before the appointed day: his right to compensation did not arise before the appointed day, so that he satisfied the first condition; but he was not insured against pneumoconiosis under the Act of 1946, so that he did not satisfy the second condition. He was therefore not within the exception to the proviso.

I have said that he was not insured under the Act of 1946: in the arbitration proceedings and in the Court of Appeal this was common ground between the parties, nor was anything to the contrary suggested in the appellants’ formal case in this House. But at the hearing of the appeal learned counsel sought leave to argue that he was so insured: it was not entirely clear whether this was a question of law or of fact or of mixed law and fact, but your Lordships were unanimous in thinking that the appellants should not at this stage be allowed to resile from a position

⁸ [1951] A.C. 531.

that they had consistently maintained throughout the proceedings. It was urged that in *Hales v. Bolton Leathers Ltd.*,⁸ where a somewhat similar situation arose, such an indulgence had been granted. But in such a matter each case must depend on its own facts and in the present case there appear to be no facts which would justify a departure from the usual procedure of the House.

So far, then, my Lords, there seems to be no answer to the respondent's claim, but, as I have said, the appellants rested their case on the decision of the Court of Appeal in *Harris v. Rotol Ltd.*⁹ In that case a certifying surgeon on August 17, 1949, purporting to act under section 43 of the Workmen's Compensation Act, 1925, certified that the plaintiff, a workman, was suffering from dermatitis produced by dust or liquid and that the date of disablement was February 6, 1948. I remind your Lordships that the appointed day for the relevant purposes of the Act of 1946 was July 5, 1948. The workman claimed compensation. The Court of Appeal held (1) that the right to compensation under the Act of 1925 did not arise until the time of the disability or incapacity; (2) that under section 43 of the Act of 1925, until a certificate was given, there was no right to compensation; and (3) that on August 17, 1949, the certifying surgeon was functus officio and could not found a right to compensation by giving a certificate. The court therefore held that the claim to compensation was barred by section 89 (1) of the Act of 1946. That this decision left a possible hiatus between compensation under the old Acts and insurance under the latter Act was recognized by the court, a result clearly to be avoided if the language of the Act fairly admits of any other construction.

My Lords, I do not find the decision in *Harris v. Rotol Ltd.*⁹ easy to follow. I do not dissent from the view that the right to compensation in such a case arises only when a certificate is given: this flows, I think, from the decision of this House in *Hales v. Bolton Leathers Ltd.*⁸ But with respect I differ from the opinion of the Court of Appeal, which is really the foundation of its decision, that, where in the case of an industrial disease no certificate has been given before the appointed day, that is an end of the matter: the certifying surgeon is functus officio, he cannot give a certificate, and without a certificate a right to compensation cannot arise. As I read the judgment of Cohen L.J. (in which the other members of the court concurred), this was a proposition of general application and it was so treated by

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⁸ [1951] A.C. 531.⁹ [1950] 2 K.B. 573.

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the arbitrator in the present case. It was not expressed to depend on the fact that the workman was insured under the Act of 1946, of which there was no evidence. If the judgment was intended to be so limited, I would reserve my opinion upon it. But if it was intended to cover a case such as the present one, where the workman is not insured under the Act of 1946, and his disability is in respect of employment before the appointed day, I must dissent from it. I see no ground for saying that in such a case the certifying surgeon is *functus officio*. It is clear that he is not for all purposes *functus officio*: see, e.g., the *Pneumoconiosis (Medical Arrangements) (Transitional) Regulations, 1948* (S.I. 1948, No. 1396): and it appears to me that, where a workman suffering from a disability is not insured under the Act of 1946 so as to obtain benefit thereunder, there are no provisions of the Act which deny the workman recourse to him for the purpose of obtaining the proper certificate.

In these circumstances I move that this appeal be dismissed with costs.

My Lords, my noble and learned friend Lord Radcliffe, who is unable to be here today, has asked me to say that he concurs in my reasons and conclusion.

LORD GODDARD. My Lords, both in the county court and in the Court of Appeal this case was conducted on the footing that the respondent was not insured under the National Insurance (Industrial Injuries) Act, 1946, against pneumoconiosis, the disease from which he was found to be suffering. Nor was the contrary suggested in the appellants' printed case. Accordingly your Lordships held that this appeal must proceed on the same state of facts as was assumed or admitted in the courts below. Consequently it is clear that this case cannot fall within the exception to the proviso to section 89 (1) of the Act of 1946 since one of the conditions necessary to bring it within the exception has not been fulfilled. That section provides that workmen's compensation shall not be payable in respect of any employment on or after the appointed day (July 5, 1948) and repeals as from that day the relevant enactments, but the proviso subject to the exception retains their operation in respect of cases where the right to compensation arises or has arisen in respect of employment before the appointed day. This House held in *Hales v. Bolton Leathers Ltd.*¹¹ that in the first part of the proviso the words "before the appointed day" referred to and qualified

¹¹ [1951] A.C. 531.

the words "in respect of employment." Accordingly, as in the present case the workman had contracted the disease in the course of employment before the appointed day, his right to compensation is preserved by the proviso.

The decision of the Court of Appeal in *Harris v. Rotol Ltd.*¹² was given before this House had decided *Hales'* case.¹¹ Had it followed instead of preceding *Hales'* case¹¹ I think the decision might have been different, unless it be the fact, as Somervell L.J. thought,¹³ that it was assumed throughout that the workman in that case was insured against dermatitis so that his claim was barred by the exception to the proviso. I cannot agree that the medical boards are functi officio for all purposes by reason of the repeal of the enactments contained in the opening words of section 89 (1); the proviso continues the application of the statutes to cases where the right arises or has arisen in respect of employment before their repeal and accordingly the medical boards have both the right and the duty of performing their functions in respect of those cases. The object of the proviso and the exception seems to be that a workman is not to receive both compensation and insurance payments in respect of the same disease or injury. His right to compensation arises when the certificate is given and if at that time he has become an insured person in respect of the disease or injury for which it is given he is entitled to payments under the National Insurance (Industrial Injuries) Act, 1946, but not to workmen's compensation.

I agree that this appeal should be dismissed.

LORD MORTON OF HENRYTON. My Lords, I concur.

LORD TUCKER. My Lords, this appeal has proceeded on the basis that it was accepted throughout the proceedings below that the workman was not insured under the National Insurance (Industrial Injuries) Act, 1946. It follows that the case does not fall within the exception to proviso (a) to section 89 (1) of the last-mentioned Act. The only point open to the appellants was therefore whether the opening words of the proviso were applicable. Section 89 (1) begins by enacting that workmen's compensation shall not be payable "in respect of any employment on or after "the appointed day" and that the enactments set out in Sch. IX be repealed. Then follows the proviso: "Provided that—(a) the "said enactments shall continue to apply to cases to which they

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¹¹ [1951] A.C. 531.

¹² [1950] 2 K.B. 573.

¹³ [1951] 1 K.B. 316, 322.

H. L. (E.) “ would have applied if this Act had not been passed, being cases
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“ of employment before the appointed day. . . .”

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I think it is clear from the opening words and from the language of the proviso that to preserve the right to compensation the employment in respect to which the right arises must have existed before the appointed day. If it did, as in the present case, it follows that the machinery of the Workmen’s Compensation Acts, including the operations of the medical boards, must continue to function so far as necessary to deal with such cases.

This accords with the views expressed in your Lordships’ House in *Hales v. Bolton Leathers Ltd.*,¹⁴ and with the decision of the Court of Appeal in the present case. On the other hand, the decision of the Court of Appeal in *Harris v. Rotol Ltd.*¹⁵ appears to me to conflict with *Hales’* case¹⁴ and your Lordships’ decision in the present appeal, and must, I think, be regarded as of doubtful authority.

I would accordingly dismiss this appeal.

Appeal dismissed.

Solicitors: *E. P. Rugg & Co., for Buller, Jeffries & Kenshole, Birmingham; Stafford Clark & Co., for Hooper & Fairbairn, Dudley.*

¹⁴ [1951] A.C. 531.^{*} ¹⁵ [1950] 2 K.B. 573.

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May 30, 31;		LD.								APPELLANT;	
June 4, 5;											
July 25.		AND									
		RICE								RESPONDENT.	

[TWO APPEALS.]

Landlord and Tenant—Rent restriction—Two adjacent flats let as one dwelling-house—Subsequent letting as separate flats—Original letting outside Rent Acts—Ascertainment of standard rent—Apportionment of rent—Increase of Rent and Mortgage Interest

^{*} Present: LORD PORTER, LORD MORTON OF HENRYTON, LORD REID, LORD TUCKER and LORD ASQUITH OF BISHOPSTONE.

(*Restrictions*) Act, 1920 (10 & 11 Geo. 5, c. 17), s. 12, sub-ss. 1, 3—*Increase of Rent and Mortgage Interest (Restrictions) Act*, 1938 (1 & 2 Geo. 6, c. 26), s. 5—*Rent and Mortgage Interest Restrictions Act*, 1939 (2 & 3 Geo. 6, c. 71), s. 7, sub-s. 2.

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Two adjacent and identical flats, built to be self-contained, in a block of flats in the metropolitan area, were let in February, 1939, under one lease at an annual rent of £342 10s. as one dwelling-house, communication between them being established by a door cut in the party wall. The rateable value of this unit exceeded £100. During the war of 1939–45 both flats were damaged by enemy action and the tenant ended his tenancy. In 1942 one flat was repaired and let separately at a rent of £195 a year, the communicating doorway having been blocked up, and in 1946 the other flat was also repaired and let at a rent of £250 a year to a tenant, who in 1949 brought proceedings for an apportionment of the 1939 rent, the rateable value being £79. The landlords by a cross-action asked for a determination of the standard rent which they claimed was £250 as being the rent at which it was first let to the defendant, the tenant.

^a *Held*, that the flat in question was “let” on September 1, 1939, within the meaning of section 12 of the *Increase of Rent and Mortgage Interest (Restrictions) Act*, 1920 (as amended by the Act of 1939), although it was not then let as a separate entity, and that accordingly the standard rent must be arrived at by an apportionment of the 1939 rent.

Section 5 of the Act of 1938 does not amend or repeal section 12 (3) of the Act of 1920, and accordingly apportionment is permissible, although the comprising dwelling-house is not within the Rent Acts.

Decision of the Court of Appeal (sub nom. *Rice v. Capital and Provincial Property Trust Ltd.*) [1950] 2 K.B. 481 affirmed.

APPEALS from the Court of Appeal (Bucknill L.J. and Hodson J., Denning L.J. dissenting).

The facts, stated by Lord Porter, were as follows:—These two appeals were heard together and concerned flat No. 28, which formed part of a building called West Hill Court, Millfield Lane, Highgate, London. The actions were brought in 1949 in the Bloomsbury County Court for the purpose of determining the standard rent of that flat. In one case the tenant of the flat, J. M. Rice, applied to the court to apportion the rent of the flat. In the other case the landlords, the Capital & Provincial Property Trust Ltd., applied for the standard rent to be determined. It was agreed that if apportionment was necessary, the rent would be £171 5s., but that if there was to be no apportionment, the standard rent would be £250.

The facts were undisputed. West Hill Court was built about 1933, and in 1934 the present landlords bought the property. On

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the first floor of the building there were two flats, No. 27 and No. 28. Each flat was completely self-contained with its own front door leading onto the same landing, a kitchen, W.C. and bathroom, two bedrooms, a dining room and a sitting room. Judge Dale found as a fact that the two flats were constructed as separate dwellings, having a rateable value each of an amount (viz., £79), which would bring each of them within the control of the Rent Acts. The first tenant of the two flats was a Dr. Davis. He wished to use them both as one dwelling for his family, and entered into one lease for the two flats at a rental of £430 per annum. At his request, and before he signed the lease, the partition wall in No. 28 between the dining and the sitting rooms was taken down, so as to make one large room, and a communicating door was cut in the wall between this room and the adjacent room in No. 27. Dr. Davis' lease expired in February, 1939, and on February 28, 1939, George Stephenson then took a similar lease of the premises for a term of three years from March 25, 1939, at a rental of £365 per annum. That lease, however, included a garage the rent of which has been agreed at £22 10s., so that the combined rent for the premises in question is admitted to be £342 10s. It was still subsisting on September 1, 1939.

During the war the premises were damaged by enemy action; Stephenson vacated them and his tenancy ended. In 1942 the damage to flat No. 27 was repaired; the doorway which had been cut between the two flats was blocked up, and it was then let as a separate flat at an annual rent of £195. In 1946 No. 28 was also repaired. The partition wall between the two sitting rooms, which had been taken down before Dr. Davis became tenant of the premises, was not replaced, and on September 26, 1946, No. 28 was let as a separate flat to J. M. Rice for a term of three years at an annual rent of £250.

The question for the decision of the court was whether the standard rent of No. 28 was to be ascertained by halving the rent of the two flats of £342 10s., or whether the standard rent was that at which the flat was first let as a separate flat, viz., £250. The county court judge held that "though occupied as one dwelling, these two flats were in fact let on September 1, 1939, within the meaning of section 12 (1) (a) of the 1920 Rent Act as amended, and to ascertain the standard rent of each it was necessary to apportion the rent as at that date as provided for by section 12 (3) of the said Act." That decision was challenged by the landlords but confirmed by a majority in the Court of Appeal. They appealed to the House of Lords.

L. A. Blundell for the landlords. It is not necessary for any purpose to apportion the rent reserved under the agreement of 1939. On the true construction of section 12 (1) (a), (2) and (3) of the Act of 1920, section 16 (1) of the Act of 1933, section 5 of the Act of 1938 and section 3 (1) and section 7 (2) of the Act of 1939, the Rent Restriction Acts do not provide that the standard rent of a dwelling-house brought under control by the Act of 1939 shall be ascertained by apportioning the rent of a containing property, except where the containing property is itself a dwelling-house within the Acts.

Before there can be an apportionment in such a case as this, not only must there be a letting as a separate dwelling-house, but the letting must not be extraneous to the Rent Restriction Acts. Apportionment is only allowed in the case of a dwelling-house to which the Acts apply. The house of which the rent is to be apportioned is the one to which the Acts must apply, not the portion which only subsequently came under control. One cannot find the standard rent of a dwelling-house within the Acts by apportioning the rent of a house which was outside the Acts. The Acts never applied to the combined flats nor to No. 28 until the letting in 1946. Before that it was not let as a separate entity and therefore it was not let within the meaning of the Acts, while the whole, of which it was a part, was let at a rent which kept it outside the control of the Acts. The Act did not contemplate any apportionment save of a rent which was at one time the standard rent of a controlled house. One would ignore a letting for business purposes or a furnished letting. Section 12 (3) must be read with subsection (1) of the Act of 1920, as amended, and the effect of this is that the flat must have been let within the provisions of the Acts on September 1, 1939. The joint effect of section 11 and the definition of "standard rent" in section 12 (1) (a) points to the same conclusion.

Section 12 (3) has not got an independent operation. Whatever may have been the previous position, the earlier Acts were explained or superseded by section 5 of the Act of 1938 which clearly confines apportionment to cases where both the undivided house and the house of which the standard rent is to be ascertained are dwellings to which the Acts apply. It in effect repeals or amends section 12 (3). It was intended to define the cases in which henceforth a rent might be apportioned.

The opening words of section 12 (3) indicate the only purpose for which apportionment is authorized and express a distinction between apportionment of the old rent of an undivided house to

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find out (a) whether the new separate dwelling is or is not a house to which the Acts apply and therefore whether there is jurisdiction to make an apportionment, and (b) if the answer is in the affirmative, what is the standard rent. If, without resorting to section 12 (3), it can be determined that the new smaller house now let as a separate dwelling was, at the material time, itself a controlled house within the limits defined by section 12 (2), apportionment of the old rent of the undivided house is permitted to determine the standard rent or the rateable value, but otherwise apportionment is not permitted, since it would then be necessary to apportion for two purposes, contrary to the opening words of section 12 (3).

As to structural alteration, it is a confusion of thought to require substantial alterations in the sense of an army of builders doing a large amount of work. Such structural alteration is only one of the elements required to create a new dwelling and a small physical change may completely alter the character of the property. In this case the blocking of the connecting door effected such a change. However small, it has given rise to a separate flat which was not there before, and that flat came into existence when it was let to the present tenant. The test is not the amount of labour done but the effect of what was done. The question is whether or not the flat was let in 1939 within the meaning of section 12, and the answer is that the small physical alteration has produced so large and fundamental an alteration of character that it is not true to say that it was so let. This flat is no longer identifiable with any of the accommodation formerly comprised in the double flat. There has been a functional change in that using accommodation as a separate dwelling is different from using it as part of a larger dwelling. There being a recognizable difference of function, it cannot be treated as let in 1939.

[He referred to *Woodward v. Samuels*¹; *Sinclair v. Powell*²; *Marchbank v. Campbell*³; *Woodhead v. Putnam*⁴; *Rex v. Marylebone County Court Judge*⁵; *Sutton v. Begley*⁶; *Abrahart v. Webster*⁷; *Barrett v. Hardy Brothers (Alnwick) Ltd.*⁸; *Phillips v. Potter*⁹; *Platman v. Frohman*¹⁰; *Field v. Gower*¹¹; *Signy v. Abbey National Building Society*¹²; *Upsons Ltd. v.*

¹ (1920) 89 L.J.K.B. 689.² [1922] 1 K.B. 393.³ [1923] 1 K.B. 245.⁴ [1923] 1 K.B. 252.⁵ [1923] 1 K.B. 365.⁶ [1923] 2 K.B. 694.⁷ [1925] 1 K.B. 563.⁸ [1925] 2 K.B. 220.⁹ (1925) 94 L.J.K.B. 819.¹⁰ [1929] 1 K.B. 376.¹¹ [1944] K.B. 200.¹² [1944] K.B. 449.

*Herne*¹³; *Lindop v. Quaipe*¹⁴; *Mitchell v. Barnes*¹⁵; and *Roberts v. Jones*.¹⁶]

The tenant in person. Flat No. 28 was at all material times a dwelling-house or part of a dwelling-house which was let on September 1, 1939. At that time despite the communicating door between Nos. 27 and 28 the tenant continued to use both front doors. They had separate drainage and water systems. They were not assessed for rates together, and separate accounts were delivered for the electricity and gas consumed in each. The war damage authorities also treated the flats as separate. Each part of the combined premises had accommodation in which all the major activities of life could be carried on. Although let under one tenancy each part did not cease to be a separate dwelling-house let within the meaning of the Acts. There were two separate flats with a slight junction made for convenience between them, and this is now blocked up. This flat was therefore let at the material time as part of the comprising property, and there has been no reconstruction resulting in a loss of its identity. Accordingly the apportionment provisions of the Act should be applied to find the standard rent of No. 28 for the purpose of discovering (a) whether that dwelling-house is within the Acts, and (b) whether the rent has been increased by more than the amount permitted by the Acts. In applying the apportionment provisions, it is immaterial whether or not the comprising property was itself within the Acts, for the only object of apportionment is to find out something about the dwelling-house comprised in it. The definition of "standard rent" in section 12 (1) of the Act of 1920 does not suggest that the comprising property must be within the Acts. Section 12 (3), the main apportionment provision, was always of full force and effect. The principles established by the authorities are (a) that when the comprising property was let as a whole at the material date the standard rent of a part must be fixed by apportioning the rent of that property; (b) to entitle the tenant of a part to an apportionment it is not necessary that the comprising property should be itself a dwelling-house or subject to the Acts. These flats should not be treated differently from others because they happen to have been let under the same agreement. What the landlords are here contending for is the negation of what was intended by

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¹³ [1946] K.B. 591.¹⁵ [1950] 1 K.B. 448.¹⁴ [1949] W.N. 77; [1949] 1 All
E.R. 456.¹⁶ [1947] K.B. 221.

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the Acts. [He referred to *Cole v. Harris*¹⁷; *Wright v. Howell*¹⁸; *Upsons Ltd. v. Herne*¹⁹; *Woodward v. Samuels*²⁰; *Sinclair v. Powell*²¹; *Marchbank v. Campbell*²²; *Woodhead v. Putnam*²³; *Rex v. Marylebone County Court Judge*²⁴; *Phillips v. Potter*²⁵; *Sutton v. Begley*²⁶; *Field v. Gower*²⁷; *Lindop v. Quaipe*²⁸ (see corrigenda and (1951) 67 Law Quarterly Review, p. 162); *Monk v. Murphy*²⁹; *Mitchell v. Barnes*³⁰; *Barrett v. Hardy Brothers (Alnwick) Ltd.*³¹; section 16 (1) and (2) of the Act of 1933; section 5 and section 7 (1) of the Act of 1938; *The Conveyancer* (1950), Vol. XIV (N.S.), p. 330; (1951) 67 Law Quarterly Review, p. 26; Megarry on Rent Restriction (6th ed.), pp. 243-4; and *Blundell's Rent Restriction Guide* (3rd ed.), pp. 19-20 and 48-9.]

Blundell in reply. The premises in 1939 were let as one dwelling-house and used as such and their potentiality as two dwelling-houses merely reinforces the landlords' case. In section 12 (3) the words "to apportion the rent" should be read as "to apportion the standard rent of a controlled dwelling-house to which the Acts apply," and "let" in section 12 (1) (a) should be read as "let under such conditions as attract control under the Acts" or "let within the limits prescribed by section 12 (2)." The standard rent found by apportionment should be found by apportioning a standard rent under the Acts. Section 12 (3) of the Act of 1920 should be regarded as overruled by section 5 of the Act of 1938, which supersedes it entirely so far as rent is concerned. *Mitchell v. Barnes*³² must be read according to the arguments there presented.

Their Lordships took time for consideration.

July 25. LORD PORTER. My Lords, the solution of the question for your Lordships' decision must be decided by a consideration of the relevant sections of the Rent Restriction Acts and primarily depends on the true construction of section 12 of the Act of 1920 and of section 5 of the Act of 1938. The material portions are in the following terms:—

¹⁷ [1945] K.B. 474, 489.

¹⁸ (1947) 92 S.J. 26.

¹⁹ [1946] K.B. 591, 594.

²⁰ 89 L.J.K.B. 689, 690.

²¹ [1922] 1 K.B. 393, 399.

²² [1923] 1 K.B. 245.

²³ [1923] 1 K.B. 252, 256.

²⁴ [1923] 1 K.B. 365.

²⁵ 94 L.J.K.B. 819.

²⁶ [1923] 2 K.B. 694.

²⁷ [1944] K.B. 200.

²⁸ [1949] W.N. 77; [1949] 1 All E.R. 456.

²⁹ [1949] 1 All E.R. 786 n.; [1949] *Estates Gazette* Digest 294.

³⁰ [1950] 1 K.B. 448.

³¹ [1925] 2 K.B. 220.

³² [1950] 1 K.B. 448, 450.

Act of 1920. Section 12: “ (1) For the purposes of this Act, except where the context otherwise requires—(a) the expression ‘ standard rent ’ means the rent at which the dwelling-house was let on August 3, 1914, or, where the dwelling-house was not let on that date, the rent at which it was last let before that date, or, in the case of a dwelling-house, which was first let after the said August 3, the rent at which it was first let; . . . (e) the expression ‘ rateable value ’ means the rateable value on August 3, 1914, or, in the case of a dwelling-house or part of a dwelling-house first assessed after that date, the rateable value at which it was first assessed; . . . (2) This Act shall apply to a house or a part of a house let as a separate dwelling, where either the annual amount of the standard rent or the rateable value does not exceed—(a) in the metropolitan police district, including therein the City of London, £105; (b) in Scotland, £90; and (c) elsewhere, £78; and every such house or part of a house shall be deemed to be a dwelling-house to which this Act applies; . . . (3) Where, for the purpose of determining the standard rent or rateable value of any dwelling-house to which this Act applies, it is necessary to apportion the rent at the date in relation to which the standard rent is to be fixed, or the rateable value of the property in which that dwelling-house is comprised, the county court may, on application by either party, make such apportionment as seems just, and the decision of the court as to the amount to be apportioned to the dwelling-house shall be final and conclusive. . . . ”

Act of 1938. Section 5: “ Where a dwelling-house to which the principal Acts apply is part of another dwelling-house to which those Acts apply, the standard rent of the first-mentioned dwelling-house as from September 29, 1938, shall be a standard rent ascertained by apportioning the standard rent of the second-mentioned dwelling-house, and section 12 (3) of the Act of 1920 shall apply accordingly notwithstanding that the first-mentioned dwelling-house was let as a separate dwelling on or before August 1, 1914, or on or before the date on which the second-mentioned dwelling-house was first let. ”

To this statement of the law there must be added the fact that in the case of houses under new control September 1, 1939, was substituted by Sch. I to the Act of that date for the date prescribed by section 12 (1) cited above and by section 3 (1) of the same Act of 1939 the Rent Restriction Acts were made to

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apply to every dwelling-house (other than those to which they already applied) of which the rateable value did not exceed £100.

Flat 28 is rent controlled since its rateable value is £79, but the combined premises, consisting of flats 27 and 28, were not rent controlled on September 1, 1939, inasmuch as their rateable value was £158 and their rent £342 10s. 0d. It was contended on behalf of the landlords that the rent of this combined dwelling could not be apportioned since apportionment is only permitted in the case of a dwelling-house to which the Acts apply, and the Acts never applied to the combined flats nor did they apply to No. 28 until it was let to Mr. Rice. It is, it was said, the house the rent of which is to be apportioned to which the Acts are required to apply, not the comprised portion which only came under control at a later date. In these circumstances the question for your Lordships' determination is whether the rent of a dwelling-house to which the Acts do not apply on September 1, 1939, can be apportioned in order to ascertain the standard rent of a comprised portion which is separately let at a later date and is then for the first time subject to control. If No. 28 had been separately let on September 1, 1939, and its separate rateable value alone is to be considered, the Acts then applied to it. But it was not then let as a separate entity and it is claimed was not then let within the meaning of the Acts. What was let, it is said, were the premises consisting of flats 27 and 28. No. 28 alone was not let until 1946 when a rent of £250 was exacted, and that was its first letting within the meaning of the Acts.

My Lords, arguments that premises have so changed their identity as to have become a different dwelling-house have been presented to the courts from time to time, sometimes successfully, and at other times without success. The line of demarcation, however, has now been plainly established: there must have been substantial structural alteration before the dwelling can be said to have shed its identity and become a new entity. It was contended in the present case that a sufficient structural alteration constituted one only of the elements required to create a new dwelling, that a small physical change may revolutionize the character of the property and that in the present case the blocking up of the connecting door created such a change. Accordingly, it was said, a new flat had come into existence at the time when Mr. Rice became the tenant. In a sense it is true that any division of one property into two or any union of two properties into one creates something different from the original

whole or parts, but a solution founded upon such consideration would play havoc with the Act, defeat its objects, and make apportionment meaningless. Some limit to what constitutes a change of identity must be laid down and that adopted by the courts is, in my view, justified by the language and within the scope of the Acts. Whether in any particular case there has been a sufficient alteration in the premises is a matter for the county court judge, if he has material on which to base his finding. So far as I can ascertain, the contention was not even submitted to him in the present case and it cannot be relied on now. I agree with Bucknill L.J. that flat 28 was let on September 1, 1939, and if let separately then would have been within the control of the Acts.

But though that flat was let on the material date it was not then let as a separate dwelling. Nor was the combined flat within the mischief of the Rent Restriction Acts since both the rent and the rateable value of the two portions together exceeded the required limits. In those circumstances it has to be determined whether the provisions as to apportionment contained in section 12 (3) of the Act of 1920 have any application. The matter is a little complicated by reason of the impact of section 5 of the Act of 1938, but I propose first to deal with the position apart from that section and then to consider its effect.

The argument on behalf of the appellants on this part of the case, as I understood it, was as follows: Section 11 of the Act of 1920 provides that: "A landlord of any dwelling-house to which this Act applies shall, on being so requested in writing by the tenant of the dwelling-house, supply him with a statement in writing as to what is the standard rent of the dwelling-house. . . ." When, therefore, section 12 (1) (a) says "the expression 'standard rent' means 'the rent at which the dwelling-house was let,'" "the dwelling-house" must refer back to that mentioned in section 11, i.e., a dwelling-house to which the Act applies. At the relevant date the premises demised were let at a rent which took them outside control of and were of a rateable value beyond that bringing them within the Act. The Act, therefore, did not apply to them, and when subsection (3) speaks of a "dwelling-house to which this Act applies" it is addressing itself to a case where the rent and the rateable value bring it within the scope of the Act. The rent, therefore, of a house or dwelling which is outside the Act cannot be apportioned even if the divided portions are each within the Act because either their rent or rateable value is below the prescribed figure.

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This conclusion was reached by Scrutton L.J. in *Sinclair v. Powell*³³ (though his reasoning had not the support of Bankes and Atkin L.JJ.) and receives added strength in your Lordships' House from the observations of Bankes L.J. in *Barrett v. Hardy Brothers (Alnwick) Ltd.*,³⁴ where he suggests that Scrutton L.J.'s view might have afforded a simple solution. On the other hand, it is contrary to the general line of authority such as *Woodhead v. Putnam*,³⁵ *Phillips v. Potter*,³⁶ and the actual decision in *Barrett v. Hardy Brothers (Alnwick) Ltd.*³⁷ itself. Moreover, it has the grave disadvantage of making the provisions of section 12 (3) of very little effect.

My Lords, the divergent views expressed by Salter J. in *Woodhead v. Putnam*,³⁵ which coincided with the opinions of Bankes and Atkin L.JJ. in *Sinclair v. Powell*³³ on the one hand and that of Scrutton L.J. set out in the latter case and repeated in *Barrett v. Hardy Brothers (Alnwick) Ltd.*³⁷ with some support from Bankes L.J. on the other, would require careful consideration if it were necessary to decide between them in the present case.

In Salter J.'s opinion the rent of any house, however large, could be apportioned in order to ascertain whether a part of the house which had been made into a separate dwelling at a later date was within or without the Act and "if within" what its standard rent was.

Scrutton L.J., on the other hand, considered that there was no jurisdiction to apportion except in a case where the house, the rent of which was to be apportioned, was a controlled dwelling. He points out in *Barrett v. Hardy Brothers (Alnwick) Ltd.*³⁷ that what has to be determined is the standard rent of a dwelling-house "to which this Act applies," but you cannot determine whether the Act applies until you know what the standard rent is and that therefore the Act runs round in a useless circle. "It is said," he adds,³⁸ "that you must read the words" (in subsection (3)) "as if they said: 'Where in order to determine the "standard rent or rateable value of any dwelling-house for the "purpose of seeing whether this Act applies to it, it is necessary "to apportion," etc. The words obviously do not say that in "their ordinary meaning."'

As I understand the other view, the amount of rent payable in respect of the house out of which the portion is carved, is

³³ [1922] 1 K.B. 393.³⁴ [1925] 2 K.B. 220, 223.³⁵ [1923] 1 K.B. 252.³⁶ 94 L.J.K.B. 819.³⁷ [1925] 2 K.B. 220.³⁸ *Ibid.* 226.

irrelevant: what has to be discovered is the rent of the comprised portion. It is true that it is not possible to say whether that portion is within the Acts or not until apportionment has taken place, but once the rent has been apportioned the result is known, and if the consequence of apportionment is to attribute a rent to the divided portion which brings it within the Acts, that is the standard rent.

My Lords, the latter is, I think, a method of construing the section which would protect the tenant whilst enabling a landlord who has done some substantial constructional work to claim that he has brought into being a fresh dwelling or fresh dwellings and to create as the standard rent for them the rent at which he first let them.

The question, however, still remains whether this view is consistent with the provisions of sections 11, 12 (1) (a) and 12 (2) of the Act. Section 11, like section 12 (3), uses the expression "any dwelling-house to which this Act applies." And when section 12 (1) (a) speaks of the "dwelling-house" it must, as I have said, mean the dwelling-house above referred to, i.e., one to which the Act applies. Of the three sections mentioned above section 11 requires the landlord, if requested by the tenant to do so, to furnish the tenant with a written statement of the standard rent. Section 12 (1) (a) defines "standard rent" and section 12 (2) specifies the dwelling-houses to which the Act applies.

For the purpose of the present case the landlord is required by section 11 to inform the tenant what the rent of his flat was on September 1, 1939, that being the material date in respect of a house under new control. To this demand the landlord might reply: "I cannot do so, because (1) the flat was not then let; (2) it had no separate rent; and (3) it was not let as a separate dwelling." So far as (1) is concerned I have already expressed the opinion that the flat *was* let on September 1, 1939. It is true that it was not let as a separate entity, but nevertheless it was let.

But, it is said, that fact is not enough, the dwelling-house in the subsection means a dwelling-house to which the Acts apply and it was not a dwelling-house to which the Acts applied on September 1, 1939, because it was not a separate dwelling and because the whole of which it formed part was let at a rent which took it outside the mischief of the Acts.

My Lords, I approach with diffidence the construction of phraseology framed, I believe, to meet a temporary difficulty and, therefore, not so worded as adequately to meet the many

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circumstances which might be expected to arise over a longer period. The solution which I suggest, however, is that the period to be looked for at which the premises must constitute a separate dwelling is that at which the court is required to apportion the rent, and the premises referred to are the divided portion and not those the rents of which are to be apportioned. The questions to be answered by the county court judge are: Was flat 28 a separate dwelling when proceedings were begun? Was it let on September 1, 1939? Is it necessary to apportion the rent of the property in which it was then comprised for the purpose of determining its standard rent? To all these questions I think he might answer "Yes," even in a case where the criterion as to whether the flat was within the Act or not depended upon the rent chargeable and was unaffected by the rateable value, but the case now under review does not give rise to so great a difficulty, and it does not require your Lordships to determine the applicability of the provisions of section 12 (3) of the Act of 1920 in a case where rent and not rateable value is the factor which decides whether the Acts apply to a dwelling-house or not. A definite decision in such a case must wait until its determination is necessary.

Flat 28 is controlled because its rateable value is £79 and since 1938 that is the sole criterion for determining whether premises are within the Acts or not. In the present instance there is in existence today and was when proceedings were taken in the county court a controlled flat which was let on September 1, 1939. But as it was not then separately let its standard rent can only be ascertained by apportionment and it is, therefore, necessary to apportion the 1939 rent in order to determine what part of the total rent is to be attributed to this letting.

A further proposition has, however, to be dealt with. In the first place, it is said that whatever may have been true formerly, the provisions of the previous Acts have now been superseded or explained by section 5 of the Act of 1938 and that section plainly makes it imperative that apportionment should be confined to cases where both the undivided house and the divided portion, the standard rent of which it is desired to ascertain, are dwellings to which the Act applies. It would, as I think, be an odd result of inserting a section in a later Act without any reference to the terms of an earlier Act dealing with a similar matter, if it were to effect the repeal of the provisions of the earlier Act. I cannot think that section 5 of the Act of 1938 had any such effect. The solution suggested by Hodson J. is, to my mind, the natural

explanation of the existence and form of the section. *Platman v. Frohman*³⁹ had previously accepted the view that if part of the larger entity from which that part was carved had been separately let before August 1, 1914, the rent of that portion would have been its standard rent and the rent at which the whole was let was irrelevant when the standard rent of the part was in question. Consequently, no apportionment of the rent of the whole was permissible in order to ascertain the standard rent of the part.

Section 5 of the Act of 1938 was passed in order to do away with the result of this expression of opinion. It is a mistake to read the first portion of the section as a substantive provision unaffected by its concluding words. Its true effect is to provide that in certain limited instances apportionment is permitted, notwithstanding that part of a dwelling-house had been separately let before August 1, 1914, i.e., in those cases where both the whole and the divided part are within control. In those instances the standard rent of the contained dwelling is to be ascertained by apportioning that of the containing house notwithstanding the separate letting of the part before August 1, 1914. The result is to increase the cases in which apportionment can take place, not to limit the generality of that possibility or to lessen the extent of the power given in section 12 (3) of the Act of 1920 to ascertain the standard rent of a portion of a house by apportioning the rent of the whole. But this provision in no way affects the right to claim apportionment in cases where no question as to the letting of the combined house is complicated by a previous letting of its parts.

My Lords, the Rent Acts continue to afford difficult and contentious problems to this House, and no doubt similar difficult problems will assail your Lordships in the future, and one can only regret that it has not been found possible to make their provisions clearer and more consistent with one another, but judging as best I can, I would dismiss the appeals with costs.

LORD MORTON OF HENRYTON. My Lords, it is not disputed that flat No. 28 West Hill Court is a dwelling-house which, by reason of its rateable value of £79, is subject to the provisions of the Rent and Mortgage Interest (Restrictions) Acts, 1920-1939. The question for decision is whether the standard rent of that dwelling-house is £250 per annum, the rent at which it was first let as a separate dwelling on September 26, 1946, or whether the

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³⁹ [1929] 1 K.B. 376.

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standard rent must be arrived at by an apportionment under section 12 (3) of the Act of 1920. If the latter is the correct view it is agreed that the standard rent is £171 5s. Od. per annum.

In order to arrive at an answer to the question just stated it is first necessary to decide whether on September 1, 1939, No. 28 was "let" within the meaning of section 12 (1) of the Act of 1920, as amended by section 3 (1) of the Act of 1939 and Sch. I thereto. In my opinion it was. On February 28, 1939, the owners of West Hill Court demised Nos. 27 and 28 to Mr. Stephenson for a term of three years from March 25, 1939, and that lease was still subsisting on September 1, 1939. I understand that all your Lordships are in agreement with the decision in *Upsons Ltd. v. Herne*,⁴⁰ so I may be forgiven for quoting the following passage from the judgment of Bucknill L.J. in the present case⁴¹: "... the first question to be decided is whether 'flat No. 28, which at all material times was a dwelling-house' or part of a dwelling-house, was in fact 'let' on September 1, 1939. I venture to think that if anyone had asked the landlord in 1939 whether flat No. 28 was let, he would have answered 'Yes.' I know of no decided case which has laid down that a flat is not let because it has been let with another flat under one lease. On the contrary, the decision of the Court of Appeal in *Upsons Ltd. v. Herne*⁴⁰ clearly decides the opposite. The relevant facts in that case, in so far as they resemble the facts in the present case, were that until after 1914 two flats, one of which was called flat 2A, together with a shop, were let to one Klein under a single lease at an annual single rent of £150. The three buildings were covered by one roof, but were in all other respects separate. In 1925 flat 2A, the rateable value of which had at all material times been below the limits fixed by the Rent Acts, was let separately to another person, and the question at issue was whether the standard rent of flat No. 2A was the rent under the separate letting, or whether it was to be fixed by apportionment of the rent of the complex of premises. The Court of Appeal held that the rent was to be fixed by apportionment. Morton L.J., in his judgment, said⁴²: 'This separate dwelling flat 2A was let to Woolf Klein in 1911 and it was still let to him on August 3, 1914. True, two other premises were included in the letting and the three were let in one lease at one rent instead of in three separate leases at three separate rents, but I cannot see how that prevents

⁴⁰ [1946] K.B. 591.

⁴² [1946] K.B. 591, 594.

⁴¹ [1950] 2 K.B. 481, 486.

“ flat 2A from being “ let ” within the meaning of the Act of 1920. Presumably, the three premises were let at a rent which was thought by lessor and lessee to be the fair aggregate annual rental for the three; but, whether this is so or not, I see no escape from the view that if three properties, A, B, and C are let by X to Y under one and the same lease, then each one of them is let by X to Y.’ The only material difference that I can see between the facts in that case and those in this case is that here a doorway was cut in the wall which divided the two flats; but in my opinion the principle enunciated by Morton L.J. applies with equal force to the present case.”

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I see no reason to repent of my observations in *Upsons Ltd. v. Herne*,⁴³ and I agree with the observations of Bucknill L.J. in the passage just quoted.

The standard rent must therefore be the rent at which No. 28 was let on September 1, 1939, and it is impossible to determine what that rent was without an apportionment of the total rent of £342 10s. 0d. attributable to Nos. 27 and 28. The present case seems, therefore, to be one which comes exactly within the wording of section 12 (3) of the Act of 1920.

Counsel for the appellants submitted that “ let ” in section 12 (1) of the Act of 1920 means “ let as a separate dwelling ” and therefore No. 28 was not “ let ” on September 1, 1939. I cannot accept this submission, or the alternative construction put forward by counsel, but I need not state my reasons as I have had the privilege of reading in print the opinions of my noble and learned friends Lord Reid and Lord Tucker. I agree with their reasoning and their conclusion. I agree also with their view that the position is in no way altered, in the present case, by subsequent legislation and that there has been no “ change in the “ identity ” of No. 28.

I would dismiss both appeals with costs.

LORD REID. My Lords, the flat which the respondent now occupies, No. 28 West Hill Court, Highgate, has and in 1939 had a rateable value of £79, so, as it is now let as a separate dwelling, it undoubtedly comes within the scope of the Rent Acts. The question at issue in this case is the amount of its standard rent. In and before 1939 this flat and the adjoining flat, No. 27, were always let together as a single dwelling-house. In 1939 they were let together with a garage for a rent of £365. The rateable value

⁴³ [1946] K.B. 591.

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of No. 27 was also £79, so the rateable value of the whole house as then let was £158. Accordingly, so long as the two flats were let together as a single dwelling-house its rateable value was above the limit of £100 and the Rent Acts did not apply to any part of the two flats. The flats suffered war damage, and after the war No. 28 was repaired and was let on September 26, 1946, to the respondent as a separate dwelling at a rent of £250. The appellants contend that that rent of £250 is the standard rent of No. 28, but the respondent contends that the standard rent of No. 28 must be found by apportioning the 1939 rent of £365 between the two flats and the garage.

As No. 28 only came within the scope of the Rent Acts after 1939 it is the Act of 1939 which applies to it. In order to find the standard rent of a house to which that Act applies it is necessary to go first to section 12 (1) (a) of the Act of 1920 as that subsection is modified by the Act of 1939. Section 12 (1) is in these terms: "For the purposes of this Act, except where "the context otherwise requires, (a) the expression 'standard " 'rent' means the rent at which the dwelling-house was let on " August 3, 1914, or, where the dwelling-house was not let on " that date, the rent at which it was last let before that date, or, " in the case of a dwelling-house which was first let after the " said August 3, the rent at which it was first let." The Act of 1939 substituted September 1, 1939, for August 3, 1914, as regards houses to which the earlier Acts did not apply when it came into force. It is therefore necessary, in the first place, to determine whether No. 28 was let on September 1, 1939. In my opinion, this case turns on the answer to that question. If No. 28 was then let, the statute directs us to find the rent at which it was then let and enacts that that is to be the standard rent. It is only if No. 28 was not let in 1939 that the statute permits us to take as its standard rent a rent which was first charged after 1939.

The word "let" in its context in section 12 (1) (a) of the Act of 1920 is ambiguous. In a sense No. 28 was let in 1939 because the whole of the space and accommodation of which it consists was then let, being then a part of the double flat let at that date at a rent of £365. But in another sense No. 28 was not then let because No. 28 did not then exist as a separate entity. It only came into existence as a separate entity when the appellants divided the double flat. If the true meaning of "let" in this subsection is "let as a separate entity" or "let as a separate "dwelling," then No. 28 was first let when it was let to the

respondent in 1946. On that interpretation there would be no difficulty in finding the standard rent. It would be £250, the rent at which No. 28 was first let after September 1, 1939. But if No. 28 is to be regarded as having been let in 1939, then there must have been a rent payable for it in 1939 and the only possible way of finding that rent is to take the rent of the double flat of which it then formed part and to apportion that rent of £365 between No. 28 and No. 27 and the garage, which together made up the subjects let in 1939.

The problem is to determine what is the meaning of the word "let" in section 12 (1) (a) of the Act of 1920 as adapted and re-enacted in 1939, and in order to solve this problem it is, I think, first necessary to see what was the meaning of section 12 (1) (a) when it was enacted in 1920. I shall later consider whether subsequent legislation has in any way altered this meaning. If there had been nothing in the Act of 1920 to authorize the apportionment of a rent in order to find the standard rent of part of the premises to which that rent had applied, that omission would have pointed to the true meaning of "let" in section 12 (1) (a) being "let as a separate dwelling," because on that interpretation no apportionment could ever have been necessary. The earlier rent of the larger premises would have been irrelevant and the standard rent would necessarily be the rent at which the premises whose standard rent was now being determined were first let as a separate dwelling. But the Act of 1920 did provide for apportionment. Section 12 (3) provided: "Where, for the purpose of determining the standard rent or rateable value of any dwelling-house to which this Act applies, it is necessary to apportion the rent at the date in relation to which the standard rent is to be fixed, or the rateable value of the property in which that dwelling-house is comprised, the county court may, on application by either party, make such apportionment as seems just, and the decision of the court as to the amount to be apportioned to the dwelling-house shall be final and conclusive." The fact that Parliament made this provision for apportionment of rent in order to find the standard rent of a dwelling-house shows that "let" in section 12 (1) (a) cannot have been intended to mean "let as a separate dwelling," but must have been used in a sense sufficiently wide to include at least some cases where the accommodation which later made up the separate dwelling had been let together with other accommodation on August 3, 1914, so that the rent for the whole accommodation then let had to be

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apportioned to find out how much of it should be attributed to that part of the whole accommodation which was later severed and made into a separate dwelling. Unless the word "let" in section 12 (1) (a) was used in this sense the whole of section 12 (3), in so far as it applies to rent, would be meaningless and of no effect and it is not to be presumed that Parliament passed a provision of this character.

If the reason which I have just given is not in itself sufficient for rejecting the interpretation that "let" in section 12 (1) (a) means "let as a separate dwelling," there are two other reasons each of which would, in my opinion, justify the rejection of that interpretation. In the first place, that interpretation would obviously have made it easy for landlords to evade the principal purpose of the Act in very many cases. All that a landlord who had regained possession of a controlled house would have had to do to get more rent from it would have been to divide it and let parts of it as new separate dwellings; he would not then have been tied to the 1914 rent and he could have charged for each part any rent that he could get. I do not think that Parliament can be supposed to have intended a meaning so obviously calculated to defeat one of its main objects. The other reason is that in all the cases decided under the Act of 1920 where this point could have been raised and would have been decisive, none has been found in which it was accepted or even seriously considered. To accept this interpretation now would introduce a revolutionary change into the interpretation of the Rent Acts, and even if I thought that it was valid, which I do not, I would not think it right at this late date to give effect to it.

The second argument for the appellants was less revolutionary. This argument proceeded on the footing of admitting that apportionment was legitimate in some cases in order to determine the standard rent of a new separate dwelling carved out of a larger house which had been let as a whole in 1914, but it was argued that in other cases no such apportionment was permissible under section 12 (3), and therefore in these cases the standard rent of the new smaller house could not be fixed with reference to the 1914 rent of the old larger house but must be the rent at which the new smaller house was first let after 1914 as a separate dwelling.

This argument for a restricted meaning of section 12 (3) takes several forms, and in one form or another it has received support from several eminent judges: but I have seen no explanation of how any form of this argument can be reconciled with any

reasonable meaning of the word "let" in section 12 (1) (a). One form of the argument is that for various reasons the Act cannot have contemplated any apportionment except the apportionment of a rent which was at one time a standard rent of a controlled house. That argument leads to a curious result. Let me suppose a house with a rateable value of £70 which was let in 1914 for a rent of £70, and suppose further that it was later divided into two separate dwellings each of which was then let for £60. Was the standard rent of each half £60 or was it an apportioned part of the whole 1914 rent of £70? On this form of the argument the answer would depend on whether the subdivision took place before or after the passing of the Act of 1920. A house of £70 rent and rateable value had not been within the scope of the earlier Acts and so if subdivision took place before 1920 the larger house never was a controlled house whereas if subdivision took place after 1920 the larger house was a controlled house with a standard rent before it was subdivided. So on this argument section 12 (3) would permit apportionment in the latter case but not in the former case, and therefore section 12 (1) (a) would have to be made to mean that the smaller house was "let" in 1914 in the latter case but not in the former case. No doubt the Act of 1920 is very loosely drafted, but even so I cannot think that it would be legitimate to give to the word "let" in section 12 (1) (a) so strange a meaning that each half of the house which I have supposed must be regarded as having been let in 1914 if the subdivision occurred in 1921 but cannot be regarded as having been let in 1914 if the subdivision occurred in 1919. I think that section 12 (3) itself provides an answer to this argument because it authorizes apportionment whenever that is "necessary." Once it has been determined that the smaller house was "let" as a part of the larger house in 1914, section 12 (1) (a) makes it necessary to find the rent at which the smaller house was let in 1914, and to do this it is necessary to apportion the 1914 rent of the larger house because there is no other possible way of doing it. There are other ways of stating this argument but all are I think open to the same objection that they require that section 12 (1) (a) must be given a complicated and unnatural meaning.

Another argument was that if it could be determined before having recourse to section 12 (3) that the new smaller house now let as a separate dwelling was itself a controlled house being within the limits set out in section 12 (2), then apportionment of the old 1914 rent of the undivided house would be legitimate

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to determine the standard rent of the new smaller house, but that otherwise apportionment was prohibited because it would then be necessary to apportion for two purposes; first to see whether the new separate dwelling was or was not a house to which the Act applied and then, if that question was answered in the affirmative, to find what was its standard rent. It was said that section 12 (3) authorizes apportionment for the second purpose only because its scope is limited by its initial words: "Where " for the purpose of determining the standard rent or rateable " value of any dwelling-house to which this Act applies . . ." It appears to me that there are also grave objections to this argument but I need not elaborate them because in the present case it is clear, without any need to have recourse to section 12 (3) for any apportionment, that the respondent's flat No. 28 is a dwelling-house to which the Acts apply. Although Nos. 27 and 28 were formerly let together, they have always had separate rateable values. It is admitted that the rateable value of No. 28 is £79 and that it is therefore a dwelling-house to which the Acts apply. So in this case the only purpose of making application under section 12 (3) is that expressly authorized by its opening words: the purpose of determining the standard rent.

The difficulties involved in giving a restricted meaning to section 12 (3) are such that I turn now to inquire whether there is any real difficulty in holding that section 12 (3) means what it says. This subsection, on the face of it, permits the apportionment of any rent no matter what its character or amount may be and the first obvious objection to such a wide reading is that the rent to be apportioned might not be the rent of a dwelling-house at all. The premises subsequently let as a separate dwelling might, in 1914, have been part of premises which were let for business purposes. Other possible cases are that the larger house might have been let furnished or might have been let at a very low rent. But it appears to me that the Act itself excludes cases of this character because section 12 (2) (i) provides that the Act shall not apply to a house let furnished or with board or attendance; section 12 (7) provides that the Act shall not apply if the rent was less than two-thirds of the rateable value of the house, and section 13 makes it clear that the Act only applied temporarily to business premises. So I do not think that it is difficult to hold that the "rent" referred to in section 12 (3) does not include rents of the kinds which I have just mentioned. But I can see no serious difficulty in holding that section 12 (3) permits the apportionment of rents of unlimited

amount, provided that the accommodation which was let in 1914 as part of the larger house remained substantially the same accommodation after it had been severed and let as a separate dwelling. I am therefore of opinion that where a large dwelling-house was let in 1914 and was subsequently let out in parts each part being let as a separate dwelling-house, the standard rent of each of these parts ought to be determined by apportioning the 1914 rent for the whole house.

The next argument for the appellants was that division of the double flat had so altered the character of the accommodation in No. 28 that No. 28 in its present form is no longer identifiable with any of the accommodation which was formerly comprised in the double flat. I do not doubt that where in dividing a larger house structural changes have been made which alter substantially the character of the accommodation, recourse can no longer be had to the old rent of the undivided house, and I see no reason to doubt the authorities which deal with that question, but I do not think that they can be extended to cover a case such as the present where there has been no substantial structural alteration. It was argued that there has been a functional change in that using accommodation as a separate dwelling is a different thing from using it as a part of a larger dwelling, and that where there has been such a change structural alterations of a trifling character are sufficient. I cannot accept this argument because it would apply in almost every case of division of a large house into separate dwellings. The Act appears to me to show a clear intention to prevent landlords from setting aside 1914 rents and charging what they like merely by letting off parts of a large house as separate dwellings.

The next argument was that, whatever may have been the position in 1920, the effect of subsequent legislation has been to narrow the scope of apportionment of rent. The only subsequent enactment which appears to me to merit consideration in this connexion is section 5 of the Act of 1938. That section provides :
 “ Where a dwelling-house to which the principal Acts apply is
 “ part of another dwelling-house to which those Acts apply, the
 “ standard rent of the first-mentioned dwelling-house as from
 “ September 29, 1938, shall be a standard rent ascertained by
 “ apportioning the standard rent of the second-mentioned dwell-
 “ ing-house, and section 12 (3) of the Act of 1920 shall apply
 “ accordingly notwithstanding that the first-mentioned dwelling-
 “ house was let as a separate dwelling on or before August 1,
 “ 1914, or on or before the date on which the second-mentioned

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“dwelling-house was first let.” It is said that this section in effect repeals or amends section 12 (3), so that after the passing of the Act of 1938 no apportionment was permissible unless it came within the scope of section 5 of that Act. I cannot read section 5 as being intended to repeal anything. The last part of this section clearly recognizes that section 12 (3) will remain in operation and further it extends the scope of section 12 (3) to cover a case where apportionment was, strictly speaking, not necessary. The precise scope and purpose of the first part of the section are obscure; I certainly cannot read into it any intention to take away from tenants rights which they previously had to obtain apportionments under section 12 (3). To bring section 12 (1) and (3) into line with the first part of this section would require an elaborate and carefully drafted amendment, and I cannot infer an intention to make such an amendment from a provision so ill drawn for that purpose. Accordingly I agree that these appeals should be dismissed.

My noble and learned friend, LORD ASQUITH OF BISHOPSTONE, is unable to be present today, and he has asked me to state that he has read the opinion which I have just given and that he concurs in it.

LORD TUCKER. My Lords, it is, I think, impossible to accept the view that “let” in section 12 (1) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, meant (in the years 1920 to 1938) “let as a separate dwelling.” This would have involved the result that where the comprising dwelling was within the Acts a landlord could have let part of the house at an uncontrolled rent, whereas he would have been limited to the August, 1914, rent in the case of the whole house. The Court of Appeal, including Scrutton L.J., rejected this interpretation in such cases: see *Sutton v. Begley*.⁴⁴ This view has been accepted ever since and even if I doubted its correctness—which I do not—I would hesitate to disturb a decision which has stood so long and been acted upon so often. Scrutton L.J., however, had previously in *Sinclair v. Powell*⁴⁵ expressed the view that where the comprising dwelling was outside the rental and rateable value limits of the Acts a first separate letting of a part after August 3, 1914, did not require an apportionment of rent of the whole. This view was not shared by Bankes and Atkin L.JJ., who were the other members of the court, though Bankes L.J. subsequently, when sitting in a Divisional Court in *Barrett v. Hardy Bros.*

⁴⁴ [1923] 2 K.B. 694.⁴⁵ [1922] 1 K.B. 393.

(*Alnwick*) *Ld.*,⁴⁶ expressed some regret that he had not accepted Scrutton L.J.'s view. A Divisional Court had decided in *Woodhead v. Putnam*⁴⁷ that apportionment of rent was necessary to decide whether or not a part of a house first separately let after August 3, 1914, was or was not within the Acts, the whole having been outside the Acts at that date. This decision was followed in 1925 in *Phillips v. Potter*.⁴⁸

My Lords, Scrutton L.J. never explained how he would—as a matter of construction as distinct from policy—have reconciled his views in these two classes of case. The view that apportionment is required where the comprising whole was within the limits of the Acts involves that “let” in section 12 (1) does not mean “let as a separate dwelling.” It cannot really have a different meaning where the whole was outside those limits. This difficulty, which has never, so far as I know, been explained, fortifies me in my view that, despite the expressed contrary opinion of Scrutton L.J. and the later doubts of Bankes L.J., the Divisional Court’s decisions, which have never been overruled and have been widely acted upon, were correct and that in both classes of case apportionment of rent is necessary if the standard rent cannot otherwise be ascertained.

I am unable to accept the argument of counsel for the appellants that the word “let” should be read as meaning “let under “such conditions as attract control under the Acts” or “let “within the limits prescribed by section 12 (2).” I can see no ground for introducing any such words. This is an attempt to read the language of subsection (1) as applying to the comprising house. I do not think the subsection is dealing with such a case at all. It is dealing with the dwelling-house or part of a dwelling-house of which it is desired to ascertain the standard rent. It is not until we get to section 12 (3) that the Act is envisaging comprising premises. When we get there and turn back to subsection (1) we find apportionment is necessary, because although the part was “let” as part of a larger whole at the material date we do not know how much of the rent is attributable to the part, but it is with the letting of the part that we have throughout been concerned.

With regard to subsequent legislation, if it was intended to alter the generally accepted interpretation of the Act this should have been done in unambiguous terms. This has not been done. Section 12 (3) has never been repealed and must in my view be

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⁴⁶ [1925] 2 K.B. 220, 223.⁴⁸ 94 L.J.K.B. 819.⁴⁷ [1923] 1 K.B. 252.

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applied where circumstances so require. In the present case the flat in question is within the Acts. It must have a standard rent. Unless "let" in section 12 (1) now means "let as a separate dwelling," although from 1920 to 1938 it had no such meaning, how is the standard rent to be ascertained save by apportionment? I share the view of Hodson J. (as he then was) that section 5 of the Act of 1938 was probably designed to meet the anomalous case illustrated by *Platman v. Frohman*,⁴⁹ but whatever its origin it leaves section 12 (3) in full force.

It only remains to say that on the facts in the present case it is clear that there has been no such change of identity that it could be said that flat No. 28 never existed until it was separately let, and I am unable to accept the appellants' contention that there has been some "functional" change which has had the same result.

For these reasons I would dismiss these appeals.

Appeals dismissed.

Solicitors: *Stephenson, Harwood & Tatham.*

⁴⁹ [1929] 1 K.B. 376.

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			AND		
LONDON AND DISTRICT	CINEMAS LD.	.			RESPONDENT.

Contract—Frustration—Supply of newsreel films—No frustrating event—Uncontemplated turn of events—Effect on contract.

By an agreement dated July 25, 1941, a company carrying on business as film suppliers agreed to supply their newsreels to a company carrying on business as exhibitors for showing at a cinema at 10 guineas a week for a minimum period of 26 weeks, the agreement to be thereafter determinable by four weeks' notice; but there was a proviso that the exhibitors might terminate the agreement by one month's notice at any time after the first

* *Present:* VISCOUNT SIMON, LORD SIMONDS, LORD MORTON OF HENRYTON and LORD TUCKER.

month. The newsreels were still being shown under the agreement when by the Cinematograph Film (Control) Order, 1943, made under Defence Regulation 55, which, in turn, had been made under the Emergency Powers (Defence) Act, 1939, no person in the film industry was to acquire or supply any film except under the authority of a licence granted by the Board of Trade. By section 1 (1) of the Act of 1939 Defence Regulations were authorized "for securing the public safety, the defence of the "realm, the maintenance of public order and the efficient prosecution of any war in which His Majesty may be engaged, and "for maintaining supplies and services essential to the life of "the community." The effect of the Order was to restrict the consumption of raw film stock.

The parties to the original agreement made a supplemental agreement dated May 3, 1943, which recited the effect of the Order and provided (inter alia) that "during the continuance" of the Order (1) the original agreement was to remain in full force and effect "until such time as the said Order is cancelled" and thereafter for any unexpired period stipulated by the original agreement; (2) one copy of a newsreel might be used to serve two exhibitors during the same period and this was, if necessary, to be deemed to include newsreels supplied by other distributors; (3) the same rental was to be paid by the exhibitors, whoever supplied the newsreels; and (4) the conditions of the original agreement were to remain in force in so far as they were not excluded or modified by the supplemental agreement.

The Emergency Powers (Defence) Act, 1939, expired on February 24, 1946, and was replaced by the Supplies and Services (Transitional Powers) Act, 1945, section 1 (1) of which gave authority for directions by Order in Council that any Defence Regulation to which it applied should have effect "for the purpose of so "maintaining, controlling and regulating supplies and services "as (a) to secure a sufficiency of those essential to the well-being of the community or their equitable distribution or their "availability at fair prices . . ." By subsection (3), where an Order in Council was made under that section all Orders made under the Regulation and in force when the date of the Order in Council came into operation should continue in force. It was directed that Defence Regulation 55 should continue in force (S.R. & O. 1945, No. 1618) and accordingly the Cinematograph Film (Control) Order, 1943, which was made under it, continued in force:—

Held, that the exhibitors were not entitled to give notice terminating the principal agreement, since (1) on the true construction of the supplemental agreement the references therein to "the continuance" of the Order of 1943 and to "such time as "the said Order is cancelled" should not be construed as referring to a period which ended when the statutory basis of Defence Regulation 55 was altered, and (2) the restrictions on the consumption of raw film continued and there had been no such vital

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change in the law operating in the circumstances as would terminate the agreement by frustration.

In a case where, though there has been no frustrating event putting an end to a contract, an un contemplated turn of events has occurred, the court has no discretion to qualify the contract for the purpose of doing what seems to it just and reasonable. However, if a consideration of the terms of the contract in the light of the circumstances existing when it was made shows that the parties never agreed to be bound in a fundamentally different situation which has unexpectedly emerged, the contract ceases to bind at that point because on its true construction it does not apply to the situation.

F. A. Tamplin Steamship Co. Ltd. v. Anglo-Mexican Petroleum Products Co. Ltd. [1916] 2 A.C. 397, and *Bank Line Ltd. v. Capel & Co.* [1919] A.C. 435 applied.

Sir Lindsay Parkinson & Co. Ltd. v. Commissioners of Works [1949] 2 K.B. 632, and dicta in *Joseph Constantine Steamship Line Ltd. v. Imperial Smelting Corporation Ltd.* [1942] A.C. 154, 186, and *Hirji Mulji v. Cheong Yue Steamship Co. Ltd.* [1926] A.C. 497, 510 explained.

Decision of the Court of Appeal [1951] 1 K.B. 190 reversed.

APPEAL from the Court of Appeal (Bucknill and Denning L.JJ. and Roxburgh J.).

The facts, stated by Viscount Simon, were as follows:—By a letter dated May 24, 1948, addressed by the respondent company to the appellant company, the former gave notice to terminate as from June 30, 1948, the then existing contract between them. This contract was contained in a principal agreement dated July 25, 1941, as modified by a supplemental agreement dated May 3, 1943. The appellant company refused to accept the notice of termination, claiming that it was not such as the contract authorized and that the respondent company were still bound. The respondent company persisted in their view and the appellant company, by writ issued on February 4, 1949, sued the respondent company for a declaration that the agreement remained in full force and effect, and for consequential relief.

Slade J. tried the action and decided in favour of the appellant company, and the Court of Appeal (Bucknill and Denning L.JJ. and Roxburgh J.), in a judgment prepared by Denning L.J., allowed the appeal of the respondent company. The appellant company appealed to the House of Lords.

The respondent company was an “exhibitor” of news films and the appellant company was a “renter,” i.e., a supplier, of such films. A news film took some eight minutes to show and was normally exhibited in the cinema where it first appeared for

three days, after which it was passed on for showing elsewhere for similar periods. Owing to the necessity of the news it contained being up to date, the total life of a given news film was approximately only two and a half weeks. In consequence of this limited life, although the film for a newsreel was so much shorter than the length of film required for ordinary pictures, the total amount of raw film used up to supply a succession of news films in the various cinemas was much larger than the amount required in the same period for the main exhibits which had a longer currency.

By the principal agreement, the appellant company as renter, by its agents Twentieth Century Fox Film Co. Ltd. (thereinafter called the "distributor"), agreed to furnish to the respondent company, as exhibitor, for exhibition at the respondent company's cinema in Aylesbury, commencing on August 4, 1941, two news films a week for the price of ten guineas weekly. The printed form used to embody the contract contained the provision: "Minimum Period of Agreement—26 (twenty-six) weeks and "thereafter determinable by four weeks' notice." Below this was a typed insertion as follows: "Notwithstanding the minimum "period of this contract it is agreed that same may be terminated "by the exhibitor by giving one month's notice, any time after "the expiration of the first month." Below this again in the print was the provision: "The exhibitor has the right at any "time after the expiry of the minimum period to give to the "renter or the distributor four weeks' notice in writing to deter- "mine this arrangement." Since it was necessary to treat the typescript insertion as prevailing over the printed provision which it contradicted, the result was that, under the principal agreement, the exhibitor had the option to determine the contract after a minimum period of eight weeks (assuming that "month" meant a lunar month of four weeks), while the renter could not take steps to determine it until 26 weeks had expired, after which he might give four weeks' notice to end it. Once, however, that the first 26 weeks had expired, i.e., as from February 2, 1942, the two parties were in the same position so far as the right to terminate the agreement by giving notice was concerned: thereafter, it would continue until one party or the other gave four weeks' notice to bring it to an end.

Performance under the principal agreement ran on without either side giving notice to terminate it, and on May 3, 1943, the parties entered into the supplemental agreement, the terms of

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which raised the problem to be solved. This supplemental agreement contained the recital that "by the Cinematograph Film (Control) Order, 1943, it has become necessary to restrict the "consumption of raw film stock." Then came the following three clauses: "1. During the continuance of the Cinematograph Film (Control) Order, 1943, the following special conditions shall also apply to the principal agreement:—(a) The principal agreement shall remain in full force and effect until such time as the said Order is cancelled and thereafter for any unexpired period stipulated in the principal agreement. (b) One copy of "a newsreel will if necessary be used to serve two exhibitors during the same period and this shall if necessary be deemed to include newsreels supplied by other renters not parties hereto. (c) If the newsreel to be supplied hereunder shall be required to serve two theatres during the same period the exhibitor shall comply with any notice in writing whereby he is required to deliver or receive the newsreel to and from another theatre which the renter shall specify. All arrangements governing the crossing over of the newsreel between performances at the two theatres and any costs incidental thereto shall be the responsibility of the exhibitor or exhibitors concerned and no claim shall arise against the renter by virtue of any failure in the aforesaid cross-over arrangements. (d) The stipulated rental payable under the principal agreement shall continue to be paid irrespective of ownership of the film which is supplied to the exhibitor and notwithstanding that the same may not be that stipulated for in the principal agreement or not actually supplied by the renter party hereto. (e) The rental stipulated in the contract may be increased from time to time by such amount as may be authorized by a Committee composed of representatives of the News Reel Association and the C.E.A. to cover:—(i) Increased cost of film stock; and/or (ii) Increased expenses incurred by the renter due to the operation of force majeure. 2. All disputes arising out of the interpretation or operation of these special conditions shall be referred to the said Joint Committee of the News Reel Association and the C.E.A. whose decision shall be final and binding on both parties. 3. All the conditions of the principal agreement shall remain in full force and effect in so far as the same are not excluded modified "or varied hereby."

The Cinematograph Film (Control) Order, 1943 (S.R. & O. 1943, No. 430), was made under regulation 55 of the Defence

(General) Regulations, 1939, which in turn were made under the authority of the Emergency Powers (Defence) Act, 1939. This Act expired on February 24, 1946, but by the Supplies and Services (Transitional Powers) Act, 1945, s. 1 (1), it was provided that His Majesty might by Order in Council direct that any Defence Regulation to which the section applied should have effect by virtue of that Act; and by section 1 (3) it was provided that where such an Order in Council was made all orders made under that regulation should continue in force. By the Defence Regulations (Control of Industry) Order, 1945 (S.R. & O. 1945, No. 1618), it was directed that regulation 55 should have effect under the Act of 1945, and accordingly the Order of 1943 remained in force likewise until it was revoked by the Cinematograph Film (Control) (Revocation) Order, 1950 (S.I. 1950, No. 1469). The relevant legislation is fully set out in the opinion of Viscount Simon.

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Diplock K.C. and *T. G. Roche* for the appellant company. The question is whether, notwithstanding that the Order of 1943 remained in force at the material time, the conditions of the supplemental agreement, and in particular clause 1 (a), ceased to apply before the letter of May 24, 1948. They did not so cease, for the words of that sub-clause meant what they said and, on their true construction, the special conditions still applied at the date of the issue of the writ.

There is in the court no such qualifying power as Denning L.J. suggested. His suggestion would raise puzzling questions. In frustration cases of the sort referred to by him,¹ does the frustration operate automatically, or must the party relying on it apply to the court? Is it a matter of discretion? If so, whose? There is nothing in the decided cases which can help in answering this sort of question. In cases of frustration, as they have hitherto been understood, one can fix a date when the frustration takes place because the frustrating event terminates the contract automatically and it is not a matter of the option of the parties. But the power which the Court of Appeal purported to exercise in this case is not one to declare the contract at an end but to do what is just and reasonable, and it does not appear what are its limits. At what date is the qualification to be imposed to be taken to be just and reasonable? The date of the contract or of

¹ [1951] 1 K.B. 190, 200.

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When the court construes a contract it is engaged in the task of finding out what the parties have agreed and what is the meaning of the words which they have used; it is finding out what agreement they have arrived at by those words. An implied term is something which necessarily follows from what the parties have expressed. But Denning L.J. did not base his judgment on an implied term, though at the end of it he formulated a term.² If the doctrine of frustration is to be regarded as the application of an implied term, then that term has only one content—that if frustration occurs the contract is determined; it cannot justify a qualifying power.

One of the sources of the doctrine suggested by Denning L.J. is *Luxor (Eastbourne) Ltd. v. Cooper*.³ In that case *Reigate v. Union Manufacturing Co. (Ramsbottom) Ltd.*⁴ was referred to: see also *Shirlaw v. Southern Foundries (1906) Ltd.*⁵ But these cases and the authorities of *Joseph Constantine Steamship Line Ltd. v. Imperial Smelting Corporation Ltd.*⁶ and *Hirji Mulji v. Cheong Yue Steamship Co. Ltd.*⁷ gave no foundation for the general doctrine that in such circumstances as are suggested the court can do what is “just and reasonable” or that it has some qualifying power in dealing with contracts. These last two cases are examples of the construction of a contract and the implication of a term in it: see *Bank Line Ltd. v. Arthur Capel & Co.*⁸ Denning L.J. relied on *Sir Lindsay Parkinson & Co. Ltd. v. Commissioners of Works*,⁹ in which was cited *Bush v. Whitehaven Trustees*.¹⁰ But that was nothing more than a case on the construction of a particular and very complicated contract. In effect it was held that the work done at first was all that the contract covered and that the rest of the work was done on a quantum meruit basis. Denning L.J. also relied on *Denny, Mott & Dickson Ltd. v. James B. Fraser & Co. Ltd.*,¹¹ but the court was not there exercising a discretion of doing what was right in a new situation. He also relied on *Chandris v. Isbrandtsen-Moller Co. Inc.*,¹² but the principle there enunciated was only meant as one of construction. It is not necessary for the appellant company

² [1951] 1 K.B. 198, 202-3.

³ [1941] A.C. 119-20, 125, 137, 144.

⁴ [1918] 1 K.B. 592.

⁵ [1939] 2 K.B. 206.

⁶ [1942] A.C. 154, 163, 181-7.

⁷ [1926] A.C. 497, 505, 509-10.

⁸ [1919] A.C. 435, 455, 457-8.

⁹ [1949] 2 K.B. 632, 645-6.

¹⁰ (1888) Hudson on Building Contracts, 4th ed., Vol. II, p. 122.

¹¹ [1944] A.C. 265, 273.

¹² [1951] 1 K.B. 240, 244.

to quarrel with that case. Denning L.J. likewise referred to *John Lee & Son (Grantham) Ltd. v. Railway Executive*,¹³ *Dennis Reed Ltd. v. Goody*¹⁴ and *Bennett, Walden & Co. v. Wood*,¹⁵ but these were also cases of construction of contracts.

There was no implied term limiting the literal meaning of the words of clause 1 (a) of the supplemental agreement, or to the effect that the special conditions should not apply after the cessation of the national emergency which existed when it was entered into, nor has either of the agreements been frustrated.

The statutory control of the material from which films are made was the reason for the supplemental agreement varying the principal agreement and no new situation was brought about by the expiry of the Act of 1939. When the supplemental agreement was made the exhibitors wanted an assured supply of news films, without the risk of the prices being put up against them save as agreed by their representatives. In return the renters created an assured market. The question now is: how long was that arrangement to continue? Its terms are plain and unambiguous and they indicate that it was to continue as long as the restrictions under the Order of 1943 continued. There is no room on the face of them for any implied term, and the contract means what it says. Least of all would it be right to imply in a contract of this kind between business men a term which depended not on fact but on legislation.

T. G. Roche following. In cases of frustration it is often hard to say whether on the facts it has arisen. The events relied on must strike at the root of the matter; no trivial intervention is sufficient. The only two alternatives are that either the contract binds or it does not. At the moment when the question whether frustration has occurred arises for consideration the active operation of the contract is usually suspended: see *Joseph Constantine Steamship Line Ltd. v. Imperial Smelting Corporation Ltd.*¹⁶ and *Metropolitan Board of Works v. Dick Kerr & Co. Ltd.*¹⁷ Cases of the type of *Sir Lindsay Parkinson & Co. Ltd. v. Commissioners of Works*¹⁸ present no difficulty, because if one of the parties to the contract continues under protest to act on it, then, should it eventually be held to be frustrated, he can be remunerated on a quantum meruit basis.

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¹³ [1949] W.N. 373; 65 T.L.R. 604.¹⁴ [1950] 2 K.B. 277.¹⁵ [1950] W.N. 329; 66 (Pt. 2)¹⁶ [1942] A.C. 154.¹⁷ [1918] A.C. 119.¹⁸ [1949] 2 K.B. 632.

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If there existed the qualifying power suggested by Denning L.J. the matter would be full of doubt in cases of frustration. The theory was never before advanced in such a case as this. In this case the fact that the Act of 1939 expired in February, 1946, did not necessarily mean that the emergency was over. There were in fact several emergencies contemplated by the Act, e.g., the imminence of war, the outbreak of war, the entry of Japan and Italy into the war. There was already an emergency existing before war was declared: see the proclamation of September 4, 1939 (London Gazette, p. 6039). The emergency was constantly changing its face and might go on after the Act expired.

Sir Roland Burrows K.C., Pearson K.C. and Kenneth Potter for the respondent company. This House is not being asked to close a chapter in the book of the law of contract or write on a new page. Counsel for the appellant company have suggested that the decision of the Court of Appeal amounts to a finding that there is now a power in the court to qualify a contract between the parties to it so as to produce a result which is just and reasonable, a power analogous to that exercised under the Inheritance (Family Provision) Act, 1938. This proposition was not submitted to the Court of Appeal and is not now put forward. The decision does not mean that where parties enter into a clear contract which, through unforeseen circumstances, becomes unfair, the court can step in and re-establish the balance on an equitable basis. It is submitted on old-established principles that on the true construction of this contract there should be judgment for the respondents. One must look at the attendant circumstances and read the contract in the light of what the parties were doing to find its meaning and effect, applying the principles laid down by Lord Blackburn in *River Wear Commissioners v. Adamson*.¹⁹

The court in construing a contract and looking at the circumstances may come to the conclusion that to enforce some matter would be to enforce something to which the parties never agreed. If A agrees to supply B with 100 tons of grain a month at a fixed price over a period of years, fluctuations in the price of grain or shortages of grain are part of the risk taken by the parties. But if an unexpected cataclysm destroys all the grain-bearing seed in the world, so that at the end of two and a half years there is no more grain, then, whatever way one puts it, one can say that the parties never agreed to be bound in that contingency. That is a matter of interpretation of the contract, not of an implied term

¹⁹ (1877) 2 App.Cas. 743, 763.

or of frustration. Where one finds general words the effect of which on the wider construction is to carry an obligation further than the parties can have meant, the court will construe them in a limited sense. *Sir Lindsay Parkinson & Co. Ltd. v. Commissioners of Works* ²⁰ and *Robinson v. Bailey*, ²¹ in which *Todrick v. Western National Omnibus Co. Ltd.* ²² was cited, illustrate the principle that there are cases where the parties have expressed themselves in language which appears to have a particular meaning but, when read in the light of their intentions as shown by the document as a whole and the attendant circumstances, is found to have a narrower interpretation. See also *Baily v. De Crespigny*. ²³ This was the principle applied by the Court of Appeal and it is no tremendous innovation. It was an application of an old principle to new circumstances.

First, on the true construction of the principal agreement as varied by the supplemental agreement, the respondent company were entitled to give four weeks' notice to determine the agreement. The modification of the principal agreement by the supplemental agreement did not affect the original right in this respect.

Alternatively, on the true construction of the supplemental agreement, it was to have effect only for so long as the Order of 1943 should remain in force by virtue of the Act of 1939. After the Act expired the Order was no longer continuing in the sense of the expression used in the supplemental agreement. The words "until such time as the said Order is cancelled" (which meant the same thing as "during the continuance" of the Order) meant until it ceased to be in force by virtue of the Act or until the date when it was revoked, whichever was the earlier. This follows from the circumstances and the intentions of the parties. What led to the supplemental agreement? A war broke out and an emergency occurred and there was difficulty in getting supplies of film for all sorts of motion pictures, owing to shortages, loss of shipping and the use of the necessary materials by the Government. The newsreels were largely of war events and were produced by film service units. The supplemental agreement was designed to ensure that the cuts should fall equally on all sections of the trade. It was part of a general trade arrangement made in time of war. The parties regarded it as temporary and not as a permanent modification of the principal agreement, and so they

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—²⁰ [1949] 2 K.B. 632.²¹ [1948] 2 All E.R. 791, 794.²² [1934] Ch. 190, 561.²³ (1869) L.R. 4 Q.B. 180, 185.

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limited it to a particular period by the formula they used. They regarded the Order then in force as part of the legislation then in force, by which the position with which they were dealing had been created. They had not in mind the post-war period. Thus on a consideration of the documents and in the light of the attendant circumstances the court should conclude that the parties did not come to the agreement to which on one possible reading they appear to have come.

Alternatively, the supplemental agreement and the principal agreement, as varied by it, were terminated and dissolved when the Order of 1943 ceased to have effect, by virtue of the Act of 1939, by the operation of a doctrine analogous to that of frustration.

Pearson K.C. following. In the interpretation of contracts there are two main rules, (a) that a party should be held to a contract into which he has entered, and (b) that he shall not be held to a contract into which he has not entered. To hold that the supplemental agreement was still in force in 1948 would be fundamentally different from what the parties agreed in 1943. That agreement was a peculiar and unbusinesslike document and not the sort of agreement into which commercial men would be likely to enter for an indefinite period. The Act of 1939 was passed in connexion with an emergency involving the defence of the realm in time of war. There is an essential distinction between the war period and the post-war period. This Order must have been understood as a war-time measure. This can be inferred from the provisions of the Act itself: see sections 1 and 11. The Order of 1943 did not continue in the sense of the agreement after the Act expired.

[*VISCOUNT SIMON.* Mr. Diplock, their Lordships would like to hear you in reply on the first point urged by Sir Roland Burrows. I understand the argument to be that when the supplemental agreement is read with the principal agreement the provision in the latter for terminating it yet remains unaltered.]

Diplock K.C. in reply. The supplemental agreement was negotiated when each of the parties was in a position to give four weeks' notice to the other. The parties did not thereby extend the minimum period of notice; they said expressly that the principal agreement should remain in force and effect till the Order of 1943 was cancelled. It would be inconsistent with that if there were a power in either party to determine it before the Order was cancelled.

Their Lordships took time for consideration.

July 26. VISCOUNT SIMON. My Lords, the question involved in this appeal is not difficult to state, but in answering the question there has emerged a difference of opinion between Slade J., who tried the action and decided in favour of the appellant company, and the Court of Appeal (Bucknill and Denning L.JJ. and Roxburgh J.), which in a judgment prepared by Denning L.J. allowed the appeal of the respondent company. It now becomes necessary to decide which party in the litigation is right. Moreover, the judgment delivered in the Court of Appeal includes an expression of some general views as to the nature and extent of the judicial function in deciding the rights and obligations of parties under an executory contract which will require careful and candid consideration from the House. [His Lordship stated the facts and continued:]

The respondent company advance two arguments. They first contend that the modification in the principal agreement effected by the supplemental agreement does not touch their original right to end the whole arrangement by four weeks' notice at any time. This contention has not prevailed in either of the courts below, and I cannot accept it. Clause 1 (a) provides in effect that the principal agreement is to remain in full force and effect till the Cinematograph Film (Control) Order, 1943, is cancelled and "thereafter" until four weeks' notice is given to terminate it, and this appears to me to rule out the exhibitor's previous right of determination at any time and to substitute a new minimum period for both parties alike. So long as the Order of 1943 continues, neither side can give notice to terminate.

The respondent company next contend—and this raises the real difficulty—that "the Cinematograph Film (Control) Order, 1943," in the sense in which that expression is used in the supplemental agreement, was no longer "continuing" when they gave their notice to terminate, but that it had already been "cancelled" within the meaning of clause 1 (a) of that agreement on February 24, 1946. In order to appreciate this contention, and to decide whether it should prevail, it is necessary to set out the history of the Order and of the authority which from time to time has given to it statutory force. The Emergency Powers (Defence) Act, 1939 (2 & 3 Geo. 6, c. 62), was passed shortly before the outbreak of war, namely, on August 24, 1939. The long title of the Act describes it as "An Act to confer on His Majesty certain powers which it is expedient that His Majesty should be enabled to exercise in the present emergency, and to

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“ make further provision for purposes connected with the defence “ of the realm.” By section 1 it authorized His Majesty by Order in Council to make such Defence Regulations “ as appear “ to him to be necessary or expedient for securing the public “ safety, the defence of the realm, the maintenance of public “ order and the efficient prosecution of any war in which His “ Majesty may be engaged, and for maintaining supplies and “ services essential to the life of the community.” Section 11 (1) of the Act provided that it should continue in force for one year only unless, at a time while the Act was in force, an address was presented to His Majesty by each House of Parliament praying that the Act should be continued in force for a further period of one year, in which case the Act would continue in force for that further period. Before any addresses were presented the Act of 1939 was amended by the Emergency Powers (Defence) Act, 1940 (3 & 4 Geo. 6, c. 20), which increased the initial duration of the former Act from one to two years (section 1 (3)). Thereafter it was continued in force, by the presentation of successive addresses each year, until August 24, 1945. By the Emergency Powers (Defence) Act, 1945 (8 & 9 Geo. 6, c. 31), s. 1, the duration of the Act of 1939 was extended by a further six months, i.e., to February 24, 1946, when it finally expired. In the meantime, on December 10, 1945, a further Act had been passed with the short title of the Supplies and Services (Transitional Powers) Act, 1945 (9 Geo. 6, c. 10). The long title of this Act described it as “ An Act to provide for the application of certain “ Defence Regulations for purposes connected with the main- “ tenance control and regulation of supplies and services, for “ enabling Defence Regulations to be made for the control of “ prices and charges, for the continuation of Defence Regulations “ so applied or made during a limited period notwithstanding the “ expiry of the Emergency Powers (Defence) Acts, 1939 to 1945,” etc. Section 1 (1) of this Act provided that if it appeared necessary or expedient to His Majesty that any Defence Regulation to which that section applied “ should have effect for the purpose of “ so maintaining controlling and regulating supplies and services “ as (a) to secure a sufficiency of those essential to the well-being “ of the community or their equitable distribution or their avail- “ ability at fair prices . . .” then His Majesty might by Order in Council direct that that regulation should have effect by virtue of this Act “ whether or not it is for the time being necessary or “ expedient for the purposes specified in subsection (1) of section 1

" of the Emergency Powers (Defence) Act, 1939." This Act further provided, by section 1 (3), that where an Order in Council made under it directed that any " Defence Regulation " should continue, then " all orders and other instruments made under the " regulation and in force at the date when the Order in Council " comes into operation shall continue in force." The period of duration of the Supplies and Services (Transitional Powers) Act, 1945, was five years from its passage, with a provision for its continuation in force for a further period of one year if Parliament adopted the necessary addresses (section 8).

Defence Regulation 55 was one of the regulations originally made under the Act of 1939. The regulation authorized a competent authority (in the present case it was the Board of Trade) " so far as appears to that authority to be necessary in the " interests of the defence of the realm or the efficient prosecution of the war, or for maintaining supplies and services " essential to the life of the community " to provide (inter alia) " (a) for regulating . . . the . . . acquisition, use or consumption " of articles of any description, and, in particular, for controlling " the prices at which such articles may be sold." It was under this power that the Board of Trade made the Cinematograph Film (Control) Order, 1943. By paragraph 1 of that Order: " On " and after April 8, 1943, no person carrying on a business in the " course of which cinematograph film . . . is acquired or supplied, " shall, except under the authority of a licence granted by the " Board of Trade and subject to any limitation or condition " attaching thereto, acquire or supply any such film."

The effect of this Order was, therefore, to control the supply of film to renters such as the appellant company and, as the recital of the supplemental agreement recognized, to restrict the consumption of raw film stock. One result of this scarcity would be to make it more difficult for renters to supply newsreels for the exclusive use of one exhibitor, and another result would be likely to be that the price charged to exhibitors in future contracts would rise. It was therefore in the interests of both parties to arrange for a more economical use of newsreels and, at the same time, to secure that existing prices charged to exhibitors should not be increased unreasonably. Both these purposes were secured by the supplemental agreement, the terms of which were settled by the organizations representing the two parties in a common form.

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After the Supplemental Agreement was made, the Cinematograph Film (Control) Order, 1943, continued under the authority of Defence Regulation 55 without material change until it was revoked by the Cinematograph Film (Control) (Revocation) Order, 1950, made on September 4 of that year, which came into force on October 1, 1950. This, of course, is after the date of the writ in this action, or, indeed, of the judgment in the Court of Appeal which is now before the House. But, whereas Defence Regulation 55 derived its force originally from the Emergency Powers (Defence) Act, 1939, after February 24, 1946, its authority rested upon the Supplies and Services (Transitional Powers) Act, 1945. The question is whether, in these circumstances, the supplemental agreement, when referring to "the continuance" of the Order and to "such time as the said Order is cancelled," ought to be construed as referring to a period which ends when the statutory basis upon which Defence Regulation 55 rests is thus altered.

This is, primarily at any rate, a question of construction. The respondent company contend that the expression "during the" "continuance of the Cinematograph Film (Control) Order, 1943," means so long as the Order is and remains in force by virtue of the Emergency Powers (Defence) Act, 1939, or any statutory amendment of the enactment thereto, and that the expression "until such time as the said Order is cancelled," means until the date when the Order ceases to be in force by virtue of the aforesaid authority, or until the date when the same is revoked, whichever shall be the earlier. This restricted construction is quite legitimate if that is, in the circumstances, the correct interpretation of the language used. But it is not the natural meaning of the words used and I can find no sufficient ground for construing them in this narrow sense. The economic considerations which must have influenced the parties in making the supplemental agreement did not change on February 24, 1946. The restriction in the consumption of raw film stock, which is referred to in the recital, continued after that date, and though a general licence was issued under the Order of July 15, 1946, for the acquisition of film used for other purposes, the restriction on film for newsreels continued until the cancellation of the Order late in 1950. The parties to the supplemental agreement chose to define the minimum period of its operation by reference to the continuance of the Order. What the length of that continuance might be was necessarily uncertain. It might have come to an end while the war was going on, if Defence Regulation 55 was revoked or if

Parliament had not adopted addresses to continue in force the Emergency Powers (Defence) Act, 1939. In fact, the Order continued for five years after the fighting ceased, but all that time there was in operation a restriction on the consumption of raw film stock. And it was throughout the original order, not a new order in the same terms. I agree with Slade J. that the restricted meaning sought to be put on the language of the supplemental agreement by the respondent company is not the correct interpretation of the words used.

It is urged, in the alternative, that the supplemental agreement should be regarded as having terminated in February, 1946, owing to the operation of a doctrine "analogous to a frustration." But what is the change of circumstances in 1946 which would cause Mackinnon L.J.'s "officious bystander" (see *Shirlaw v. Southern Foundries* (1926) *Ld.*²⁴) to get instant acceptance from both sides if he suggested that of course the supplemental agreement would come to an end, although restriction on the consumption of raw film stock continued, if the Cinematograph Film (Control) Order, 1943, and Defence Regulation 55 are no longer authorized by the Emergency Powers (Defence) Act, 1939, but gain their validity from a later Act of Parliament? It is by no means clear to me that the parties would have assented. Hannen J., in *Baily v. De Crespigny*,²⁵ observed that "to hold a man liable by words, in a sense affixed to them by legislation subsequent to the contract, is to impose on him a contract he never made." But here, though the legislative authority behind the words of the Order altered, the words themselves mean the same thing throughout. This is not a case in which there has been "a vital change of the law . . . operating on the circumstances" (to use Lord Wright's phrase in *Joseph Constantine Steamship Line Ld. v. Imperial Smelting Corporation Ld.*²⁶); here the restriction on the consumption of raw film stock continued and the Order creating the restriction was not changed, vitally or at all.

I should have been glad to conclude at this point by expressing agreement with the careful judgment of Slade J., but my colleagues who heard this appeal concur with me in the view that it is desirable, in order to remove the possibility of misunderstanding hereafter, to refer to certain passages in the judgment delivered by Denning L.J. where phrases occur which give us

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some concern. I will quote from the revision of his written judgment. After a reference to the *Constantine* case²⁷ and to *Denny, Mott & Dickson Ltd. v. James B. Fraser & Co. Ltd.*²⁸ the judgment proceeds²⁹: “In these frustration cases, as Lord Wright said, the court really exercises a qualifying power—a power to qualify the absolute, literal or wide terms of the contract—in order to do what is just and reasonable in the new situation; and it can now by statute make ancillary orders to that end. Until recently the court only exercised this power when there was a frustrating event, that is a supervening event which struck away the foundations of the contract. But in the important decision of *Sir Lindsay Parkinson & Co. Ltd. v. Commissioners of Works*³⁰ this court exercised a like power when there was no frustrating event, but only an unanticipated turn of events.” The learned Lord Justice went on to give his account of the decision in *Parkinson’s* case,³⁰ which he stated was based on *Bush v. Whitehaven Trustees*,³¹ which in turn was based on the leading frustration case of *Jackson v. Union Marine Insurance Co. Ltd.*³² He goes on³³: “The judgments show that, no matter that a contract is framed in words which, taken literally or absolutely, cover what has happened, nevertheless, if the ensuing turn of events was so completely outside the contemplation of the parties that the court is satisfied that the parties, as reasonable people, cannot have intended that the contract should apply to the new situation, then the court will read the words of the contract in a qualified sense; it will restrict them to the circumstances contemplated by the parties; it will not apply them to the unanticipated turn of events, but will do therein what is just and reasonable. . . . This does not mean that the courts no longer insist on the binding force of contracts deliberately made. It only means that they will not allow the words, in which they happen to be phrased, to become tyrannical masters. The court qualifies the literal meaning of the words so as to bring them into accord with the true scope of the contract. Even if the contract is absolute in its terms, nevertheless if it is not absolute in intent, it will not be held absolute in effect. The day is done when we can excuse an unforeseen injustice by saying to the sufferer ‘It is your own folly. You ought not to

²⁷ [1942] A.C. 154.²⁸ [1944] A.C. 265.²⁹ [1951] 1 K.B. 190, 200.³⁰ [1949] 2 K.B. 632.³¹ Hudson on Building Contracts, 4th ed., Vol. II, p. 122.³² (1874) L.R. 10 C.P. 125.³³ [1951] 1 K.B. 190, 201.

“ ‘ have passed that form of words. You ought to have put in a
 “ ‘ clause to protect yourself.’ We no longer credit a party with
 “ the foresight of a prophet or his lawyer with the draftsmanship
 “ of a Chalmers. We realize that they have their limitations and
 “ make allowances accordingly. It is better thus. The old
 “ maxim reminds us that ‘ Qui haeret in litera, haeret in cortice,’
 “ which, being interpreted, means: He who clings to the letter,
 “ clings to the dry and barren shell, and misses the truth and
 “ substance of the matter. We have of late in this court paid
 “ heed to this warning, not only in *Parkinson’s case*,³⁴ but also in
 “ *John Lee & Son (Grantham) Ltd. v. Railway Executive*,³⁵
 “ *Dennis Reed Ltd. v. Goody*,³⁶ and *Bennett, Walden & Co. v.*
 “ *Wood*,³⁷ and we must pay like heed now.”

With all respect to the learning and acumen of the learned Lord Justice, I do not agree that there has been a recent change as the result of which the courts now exercise a wider power in this regard than they previously used. Apart from the adjustment effected by the Law Reform (Frustrated Contracts) Act, 1943, which is quite irrelevant to the present point, there has been no recent change; the possibility that a fundamental alteration in circumstances may sometimes bring a contract to a premature end has long been recognized. The general principle upon which the court acts is well settled; so Lord Finlay L.C. stated in *Bank Line Ltd. v. Arthur Capel & Co.*³⁸ It can be found, for example, as Lord Porter observed in *Denny, Mott & Dickson Ltd. v. James B. Fraser & Co. Ltd.*,³⁹ in Earl Loreburn’s judgment in *F. A. Tamplin Steamship Co. Ltd. v. Anglo-Mexican Petroleum Products Co. Ltd.*,⁴⁰ where it is thus expressed: “ But
 “ a court can and ought to examine the contract and the circum-
 “ stances in which it was made, not of course to vary, but only
 “ to explain it, in order to see whether or not from the nature
 “ of it the parties must have made their bargain on the footing
 “ that a particular thing or state of things would continue to
 “ exist. And if they must have done so, then a term to that
 “ effect will be implied, though it be not expressed in the
 “ contract. . . . No court has an absolving power, but it can
 “ infer from the nature of the contract and the surrounding
 “ circumstances that a condition which is not expressed was a

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Simon.³⁴ [1949] 2 K.B. 632.³⁵ [1949] W.N. 373; 65 T.L.R. 604.³⁶ [1950] 2 K.B. 277.³⁷ [1950] W.N. 329; 66 (Pt. 2)

T.L.R. 3.

³⁸ [1919] A.C. 435, 441.³⁹ [1944] A.C. 265, 281.⁴⁰ [1916] 2 A.C. 397, 403, 404.

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“foundation on which the parties contracted.” While the principle remains the same, particular applications of it may greatly vary, and theoretical lawyers may debate whether the rule should be regarded as arising from an implied term, or because the basis of the contract no longer exists. In any view, it is a question of construction, as Lord Wright pointed out in *Constantine’s* case,⁴¹ and as has been repeatedly asserted by other masters of the law.

When the authorities referred to by Denning L.J. as justifying the proposition that judges now exercise a wider power in these matters than they did some years ago are examined it will be found that they do not support any such notion. The decision of the Court of Appeal in *Parkinson’s* case⁴² does not mark a new departure at all. No extracts from the judgments in that case were quoted by the Lord Justice on the ground that they were “so valuable that they should be read in full.”⁴³ When they are read in full, however, it seems to me indisputable that what was there decided was merely that, having regard to the terms of the variation deed and to the circumstances which led up to its execution, the deed could not, on its true construction, be interpreted as authorizing the Commissioners of Works at their pleasure to order an infinite quantity of extra work, to be executed over an unlimited time, on which the plaintiffs could never make any profit beyond the figure named. Asquith L.J.’s judgment⁴⁴ makes it clear that the only question was this question of construction. He says⁴⁵: “Where the language of “the contract is capable of a literal and wide, but also of a less “literal and a more restricted, meaning, all relevant circumstances can be taken into account in deciding whether the “literal or a more limited meaning should be ascribed to it.” Cohen L.J. reached the same conclusion as a matter of construction, and incidentally expounded *Bush v. Whitehaven Trustees*⁴⁶—to which Denning L.J. also referred as though it embodied some new doctrine—in a way which shows that no novel principle was involved. Singleton L.J. was of the same opinion. In substance, the decision in *Parkinson’s* case⁴⁷ was that the work that had been executed by the contractors included more than was covered, on its true construction, by the variation deed, and that the cost of the uncovenanted addition had therefore to be paid for by a quantum meruit.

⁴¹ [1942] A.C. 154, 184.

⁴² [1949] 2 K.B. 632.

⁴³ [1951] 1 K.B. 190, 201.

⁴⁴ [1949] 2 K.B. 632, 662-5.

⁴⁵ *Ibid.* 662.

⁴⁶ Hudson on Building Contracts, 4th ed., Vol. II, p. 122.

⁴⁷ [1949] 2 K.B. 632.

The three other cases referred to in the Court of Appeal's judgment as further illustrations of the expanded doctrine are equally mere applications of established rules of construction. In *John Lee & Son (Grantham) Ltd. v. Railway Executive*⁴⁸ Denning L.J. himself so explained the decision, preferring "a "limited construction" of which the words were capable to the wider interpretation suggested. *Dennis Reed Ltd. v. Goody*⁴⁹ was again merely a case of interpreting the language of a contract; Denning L.J. was again a party to the decision and said so. *Bennett, Walden & Co. v. Wood*⁵⁰ is also a pure case of construction; the Court of Appeal held that the words "in the "event of our securing for you an offer" referred to a firm offer, which by acceptance would give rise to a contractual relationship. None of these three decisions illustrate the exercise of any recent extension of judicial practice or power.

It is of the utmost importance that the action of a court, when it decides that in view of a supervening situation the rights and obligations under a contract have automatically ceased, should not be misunderstood. The suggestion that an "uncontemplated "turn of events" is enough to enable a court to substitute its notion of what is "just and reasonable" for the contract as it stands, even though there is no "frustrating event," appears to be likely to lead to some misunderstanding. The parties to an executory contract are often faced, in the course of carrying it out, with a turn of events which they did not at all anticipate—a wholly abnormal rise or fall in prices, a sudden depreciation of currency, an unexpected obstacle to execution, or the like. Yet this does not in itself affect the bargain they have made. If, on the other hand, a consideration of the terms of the contract, in the light of the circumstances existing when it was made, shows that they never agreed to be bound in a fundamentally different situation which has now unexpectedly emerged, the contract ceases to bind at that point—not because the court in its discretion thinks it just and reasonable to qualify the terms of the contract, but because on its true construction it does not apply in that situation. When it is said that in such circumstances the court reaches a conclusion which is "just and reasonable" (Lord Wright in *Constantine's case*⁵¹) or one "which justice

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⁴⁸ [1949] W.N. 373; 65 T.L.R. 604, 606.

⁴⁹ [1950] 2 K.B. 277.

⁵⁰ [1950] W.N. 329; 66 (Pt. 2) T.L.R. 3.

⁵¹ [1942] A.C. 154, 186.

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“demands” (Lord Sumner in *Hirji Mulji v. Cheong Yue Steamship Co. Ltd.*⁵²), this result is arrived at by putting a just construction upon the contract in accordance with an “implication . . . from the presumed common intention of the parties” (Lord Sumner in *Bank Line Ltd. v. Arthur Capel & Co.*⁵³).

If the decisions in “frustration” cases are regarded as illustrations of the power and duty of a court to put the proper construction on the agreement made between the parties, having regard to the terms in which that agreement is expressed, and to the circumstances in which it was made, including any necessary implication, such decisions are seen to be examples of the general judicial function of interpreting a contract when there is disagreement as to its effect. What distinguishes “frustration” cases is that the interpretation involves the consequence that, in view of what has happened, further performance is automatically ended. This is because the frustrating event (such, for example, as war or prolonged delay) must be regarded as introducing a new situation to which no limit can be put. But there are, of course, many other examples where the court has to put an interpretation on the agreement made, not with the result that the contract is brought to an end by frustration, but with the result that the contract goes on and continues to bind the parties according to its true construction. *Bennett, Walden & Co. v. Wood*,⁵⁴ quoted by Denning L.J., is an obvious example. The advantage of approaching the topic in this way seems to me to be that it makes plain that in all cases alike the question is really at bottom a question of construction.

In my opinion the appeal succeeds, and I move that it be allowed with costs here and below.

LORD SIMONDS. My Lords, I have had the advantage of reading the opinion which my noble and learned friend on the woolsack has just delivered. I agree so fully with it that I shall add only a few words out of respect for the Court of Appeal, from whose judgment we are differing.

The case is one which, as I think, presents little difficulty. There is first a question of construction, viz.: was the respondent company entitled under the terms of the principal and supplementary agreements, read, as they must be read, as one agreement, to give four weeks’ notice to determine it? For the reasons given by my learned and noble friend I think that clearly

⁵² [1926] A.C. 497, 510.⁵³ [1919] A.C. 435, 455.⁵⁴ [1950] W.N. 329; 66 (Pt. 2) T.L.R. 3.

it was not. I do not understand that the Court of Appeal took a different view on this point. Secondly there is a question, which is also a question of construction and nothing else, whether there should be implied in the agreement a term to the effect that it should continue in force for the duration of the emergency contemplated by the Emergency Powers (Defence) Act, 1939, and (negatively) that it should not continue in force when the Cinematograph Film (Control) Order, 1943, no longer had effect by virtue of the provisions of that Act? My Lords, I can only say that, having considered the many authorities in which it has been held legitimate to imply a term in a written contract, I can find none which by its example or its language would justify your Lordships in implying any such term as that which is postulated in the agreement which these parties have made. On the contrary I think that it would be the merest guesswork to do so. And if I had myself to make a guess it would be that the parties intended the agreement to endure so long as the Order of 1943 endured, whether or not that Order owed its continued existence to the Act of 1939 or some other Act. Upon this point I regret that I cannot accept the view of the Court of Appeal, though it is not the primary reason for their decision in favour of the respondents.

Next, there was the familiar question of frustration. Here, too, I feel no difficulty. It would in my opinion be to push the doctrine to unprecedented and extravagant lengths to say that any event has happened which has caused the contract to be frustrated at law. Similar considerations are involved to those which are relevant to the question of an implied term. I would say with respect that I prefer the view expressed by my Lord on the woolsack in *Constantine's* case⁵⁵ as to the basis on which the doctrine is founded to that which found favour with one at least of the noble and learned Lords who took part in *Denny, Mott & Dickson Ltd. v. James B. Fraser & Co. Ltd.*⁵⁶ But it is unnecessary to pursue this matter, for, as I read the judgment of the Court of Appeal, the respondent's success does not rest on the doctrine of frustration.

These were the three grounds on which learned counsel for the respondents invited the House to dismiss the appeal, plain construction, implied term, and frustration, and with each of them I have dealt briefly, for it appears to me that the case against the respondents is overwhelming. But it was not on any of these orthodox grounds, as I may call them, that the Court of

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⁵⁵ [1942] A.C. 154.⁵⁶ [1944] A.C. 265, 275.

H. L. (E.) Appeal founded its judgment. Upon this part of the case I wish to say explicitly that I concur in every word that has fallen from my noble and learned friend who has just spoken. I hesitate to make any brief comment upon the judgment of Denning L.J. lest by taking a passage out of its context I should do injustice to the whole. But I must at least dissent from the suggestion of the learned Lord Justice that the court, whether it is exercising its function in construing a document or in applying the law of frustration to particular circumstances, "really exercises a "qualifying power . . . in order to do what is just and reasonable in the new situation."⁵⁷ Nor can I accept the theory, which appears to underlie his judgment, that in recent cases and in *Parkinson's* case⁵⁸ in particular there has been some development of this branch of the law, which would justify such a proposition as that just cited. It is no doubt essential to the life of the common law that its principles should be adapted to meet fresh circumstances and needs. But I respectfully demur to the suggestion that there has recently been, or need be, any change in the well known principles of construction or (except so far as the recent Act of 1943 provides) in the application of the law of frustration to commercial agreements, and, if indeed, as Denning L.J. appears to suggest, such cases as *John Lee & Son (Grantham) Ltd. v. Railway Executive*,⁵⁹ *Dennis Reed Ltd. v. Goody*,⁶⁰ and *Bennett, Walden & Co. v. Wood*,⁶¹ illustrate such a change, they would have to be regarded as of doubtful authority. They can, however, be justified on more orthodox grounds.

I agree that the appeal should be allowed and the judgment of Slade J. restored.

LORD MORTON OF HENRYTON. My Lords, I agree with the opinions which have just been delivered and I do not desire to add any words of my own.

LORD TUCKER. My Lords, I agree that this appeal should be allowed for the reasons which have been stated by my noble and learned friend on the woolsack. I also desire to express my concurrence in the observations which he has made with regard to the judgment of the Court of Appeal delivered by Denning L.J.

Appeal allowed.

Solicitors: *Freshfields; Sydney Morse & Co.*

⁵⁷ [1951] 1 K.B. 190, 200.

⁶⁰ [1950] 2 K.B. 277.

⁵⁸ [1949] 2 K.B. 632.

⁶¹ [1950] W.N. 329; 66 (Pt. 2)

⁵⁹ [1949] W.N. 373; 65 T.L.R. 604. T.L.R. 3.

[HOUSE OF LORDS.]

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MAGOR AND ST. MELLONS RURAL DISTRICT COUNCIL

APPELLANTS;

AND

NEWPORT CORPORATION RESPONDENTS.

1951
July 4, 5;
Oct. 25.*Statute—Construction—Interpretation of words used—No power in court to fill in gaps.*

In the construction of a statute the duty of the court is limited to interpreting the words used by the legislature and it has no power to fill in any gaps disclosed. To do so would be to usurp the function of the legislature.

APPEAL from the Court of Appeal (Cohen and Somervell L.JJ., Denning L.J. dissenting).

This was an appeal from an order of the Court of Appeal dated November 27, 1950, affirming the judgment and order of the King's Bench Division (Parker J.) in favour of the respondents on the consideration of a special case stated by the arbitrator between the parties in an arbitration under section 58 of the Newport Extension Act, 1934, and sections 151 and 152 of the Local Government Act, 1933. The matters in issue between the parties arose on the interpretation of sections 151 and 152 and Sch. V of the Act of 1933, and the County of Monmouth Review Order, 1933, made by the Minister of Health.

In the course of his judgment Denning L.J. said ¹: "This was "so obviously the intention of the Minister's Order that I have "no patience with an ultra-legalistic interpretation which would "deprive" [the appellants] "of their rights altogether. I would "repeat what I said in *Seaford Court Estates Ltd. v. Asher*.² "We do not sit here to pull the language of Parliament and of "Ministers to pieces and make nonsense of it. That is an easy "thing to do, and it is a thing to which lawyers are too often "prone. We sit here to find out the intention of Parliament and "of Ministers and carry it out, and we do this better by filling "in the gaps and making sense of the enactment than by opening "it up to destructive analysis."

* *Present*: LORD SIMONDS, LORD GODDARD, LORD MORTON OF HENRYTON, LORD RADCLIFFE and LORD TUCKER.

¹ [1950] 2 All E.R. 1226, 1236.

² [1949] 2 K.B. 481, 498-9.

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Simes K.C. and Scholefield for the appellants.*Harold Williams K.C. and Stewart-Brown* for the respondents.

Their Lordships took time for consideration.

October 25, 1951. The House dismissed the appeal, Lord Radcliffe dissenting.³

By reason of the repeal of section 152 (1) (b) of the Act of 1933 by section 11 of the Local Government Act, 1948, and Part I of Sch. II thereto, it is unnecessary to report the case save as relates to their Lordships' observations as to the construction of statutes.

LORD SIMONDS. My Lords, I have had the advantage of reading the opinion which my noble and learned friend Lord Morton of Henryton is about to deliver, and I fully concur in his reasons and conclusion, as I do in those of Parker J. and the majority of the Court of Appeal. Nor should I have thought it necessary to add any observations of my own were it not that the dissenting opinion of Denning L.J. appears to invite some comment.

My Lords, the criticism which I venture to make of the judgment of the learned Lord Justice is not directed at the conclusion that he reached. It is after all a trite saying that on questions of construction different minds may come to different conclusions, and I am content to say that I agree with my noble and learned friend. But it is on the approach of the Lord Justice to what is a question of construction and nothing else that I think it desirable to make some comment; for at a time when so large a proportion of the cases that are brought before the courts depend on the construction of modern statutes it would not be right for this House to pass unnoticed the propositions which the learned Lord Justice lays down for the guidance of himself and, presumably, of others.

"We sit here," he says,⁴ "to find out the intention of Parliament and of Ministers and carry it out, and we do this better "by filling in the gaps and making sense of the enactment than "by opening it up to destructive analysis." The first part of this passage appears to be an echo of what was said in *Heydon's Case*⁵ 300 years ago, and, so regarded, is not objectionable. But the way in which the learned Lord Justice summarizes the broad

³ [1951] W.N. 542.⁵ (1584) 3 Co.Rep. 7a.⁴ [1950] 2 All E.R. 1226, 1236.

rules laid down by Sir Edward Coke in that case may well induce grave misconception of the function of the court. The part which is played in the judicial interpretation of a statute by reference to the circumstances of its passing is too well known to need restatement; it is sufficient to say that the general proposition that it is the duty of the court to find out the intention of Parliament—and not only of Parliament but of Ministers also—cannot by any means be supported. The duty of the court is to interpret the words that the legislature has used; those words may be ambiguous, but, even if they are, the power and duty of the court to travel outside them on a voyage of discovery are strictly limited: see, for instance, *Assam Railways & Trading Co. Ltd. v. Inland Revenue Commissioners*,⁶ and particularly the observations of Lord Wright.⁷

The second part of the passage that I have cited from the judgment of the learned Lord Justice is no doubt the logical sequel of the first. The court, having discovered the intention of Parliament and of Ministers too, must proceed to fill in the gaps. What the legislature has not written, the court must write. This proposition, which restates in a new form the view expressed by the Lord Justice in the earlier case of *Seaford Court Estates Ltd. v. Asher*⁸ (to which the Lord Justice himself refers), cannot be supported. It appears to me to be a naked usurpation of the legislative function under the thin disguise of interpretation. And it is the less justifiable when it is guesswork with what material the legislature would, if it had discovered the gap, have filled it in. If a gap is disclosed, the remedy lies in an amending Act.

For the reasons to be given by my noble and learned friend I am of opinion that this appeal should be dismissed with costs.

LORD MORTON OF HENRYTON communicated the agreement of LORD GODDARD with his opinion, stated his reasons for dismissing the appeal and, with reference to the observations in the judgment of Denning L.J., said: My Lords, I have already described this as a vigorous judgment, and it is certainly one which invites some comment. I feel sure that Parker J. had no desire to defeat the Minister's intention by giving an ultra-legalistic interpretation to this Order; nor did he wish to pull the language of the Act of 1933 and of the Order of 1935 to pieces, or to make nonsense of them. He set out to interpret the Act and the Order, and I agree with

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⁶ [1935] A.C. 445. ✓

⁷ Ibid. 458.

⁸ [1949] 2 K.B. 481, 498–9.

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his interpretation. In so far as the intention of Parliament or of Ministers is revealed in Acts of Parliament or Orders, either by the language used or by necessary implication, the courts should, of course, carry these intentions out; but it is not the function of any judge to fill in what he conceives to be the gaps in an Act of Parliament. If he does so, he is usurping the function of the legislature.

LORD RADCLIFFE delivered an opinion in favour of allowing the appeal.

LORD TUCKER delivered an opinion in favour of dismissing the appeal.

Appeal dismissed.

Solicitors: *Torr & Co.; Rees & Freres, for the Town Clerk, Newport, Mon.*

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CANADA STEAMSHIP LINES LD. . . . APPELLANTS;
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ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—Contract—Freight shed—Lease by Crown—Fire caused by negligence of Crown's servants—Loss of goods—Liability of Crown—Third party proceedings—Indemnity clause—Construction.

By clause 7 of a lease by which the Crown leased a freight shed to the appellant company it was provided that "the lessee shall not "have any claim . . . against the lessor for . . . damage . . . to . . . "goods . . . being . . . in the said shed," and by clause 8 the Crown undertook to keep the shed in repair. Clause 17 provided that "the lessee shall at all times indemnify . . . the lessor from and "against all claims . . . by whomsoever made . . . in any manner "based upon, occasioned by or attributable to the execution of these "presents, or any action taken or things done . . . by virtue hereof, "or the exercise in any manner of rights arising hereunder."

Owing to the negligence of the Crown's servants while using an oxy-acetylene torch to effect certain repairs to the shed, a fire broke

* *Present*: LORD PORTER, LORD NORMAND, LORD MORTON OF HENRY-TON, LORD ASQUITH OF BISHOPSTONE and LORD COHEN.

out which destroyed the shed and all its contents. The appellant company and others, whose goods were lost in the fire, having presented petitions of right against the Crown for damages, the Crown pleaded that the appellant company's claim was barred by clause 7 of the lease, and in third party proceedings relied on clause 17 as giving rise to a right of indemnity from the appellants against the claims of the other suppliants.

Held, first, that the Crown had failed in clause 7 to limit its liability in respect of negligence in clear terms, and that accordingly, on the principle stated in *Alderslade v. Hendon Laundry Ltd.* [1945] K.B. 189, at 192, which appeared not to be in conflict with the law of Lower Canada, the clause was to be construed as relating to a liability not based on negligence, instances of which were to be found in certain of the obligations imposed on lessors by the Civil Code of Lower Canada. The Crown was not, therefore, protected against the claims for loss by clause 7.

Held, secondly, that clause 17 did not cover negligent acts of the Crown's servants, for (a) it was at least doubtful whether the words "any action taken or things done . . . by virtue hereof" could be applied to a negligent act done in the course of carrying out an obligation; (b) even if they were wide enough to include such a negligent act, the principle in the *Alderslade* case, *supra*, must be applied on the ground that the head of damage might be based on some other ground than that of negligence; and (c) the meaning and effect of clause 17 were far from clear, and such a liability must be imposed by clear words. The Crown's claim to indemnity under clause 17 was not therefore established.

There would have been no difficulty in inserting in clauses 7 and 17 an express reference to negligence of the Crown's servants if those clauses had been intended to protect the Crown against the consequences of such negligence.

Judgment of the Supreme Court of Canada [1950] S.C.R. 532 reversed.

APPEAL (No. 15 of 1951), by special leave, from six judgments of the Supreme Court of Canada (June 23, 1950) reversing in part six judgments of the Exchequer Court of Canada (November 3, 4, 6, 12, 13 and 20, 1948), which had maintained petitions of right against the Crown for damages arising out of a fire.

By a lease dated November 18, 1940, the Crown leased to the appellants, Canada Steamship Lines Ltd., a freight shed on a wharf in the St. Gabriel Basin in the inner harbour of Montreal, and by clause 8 of the lease the Crown undertook to keep the shed in repair. On May 5, 1944, three employees of the Crown were effecting repairs to the shed at the request of the appellants, and in doing so had occasion to enlarge a hole in a steel beam. Instead of using for the purpose a hand drill, they used an oxy-acetylene cutting torch. Some sparks fell on to some bales of

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cotton waste in the shed, and started a fire which destroyed the shed and all its contents. The shed contained \$533,584 worth of goods, of which \$40,714 worth belonged to the appellants, and the remainder to others.

Petitions of right were presented against the Crown based on an allegation of the Crown's negligence, and apart from the present six cases some 250 other cases were pending the decision in these proceedings. In answer to the petition of the appellants the Crown denied negligence, and, in addition, said that if they were guilty of negligence clause 7 of the lease exempted them from liability to the appellants. That clause provided: "That the lessee shall not have any claim or demand against the lessor for . . . damage . . . to the said shed . . . or to any . . . goods . . . at any time . . . being . . . in the said shed." The Crown also brought in the appellants as third parties on the other petitions, saying that if the Crown were guilty of negligence the appellants, under clause 17 of the lease, were liable to indemnify the Crown against the consequences of their (the Crown's) negligence. Clause 17 provided: "That the lessee shall at all times indemnify . . . the lessor from and against all claims and demands, loss, costs, damages, actions, suits, or other proceedings . . . brought . . . in any manner based upon, occasioned by or attributable to the execution of these presents, or any action taken or things done . . . by virtue hereof. . . ."

The facts and the clauses of the lease are stated more fully in the judgment of the Judicial Committee.

The Exchequer Court (Angers J.) found as a fact that the fire and the resulting damage were caused by the gross negligence (*faute lourde*) of the Crown's servants, and he condemned the Crown to pay to the appellants and to the other five suppliants the damages claimed by them, and he dismissed the third party proceedings brought by the Crown against the appellants.

The Supreme Court of Canada (Rinfret C.J., Rand, Kellock, Estey, Locke, Cartwright and Fauteux JJ.), by a majority of six to one (Locke J. dissenting), reversed the trial judge in the appellant's own case, and unanimously reversed the trial judge in the cases of the other five suppliants in so far as the third party proceedings of the Crown against the appellants were concerned. The Supreme Court concurred in the finding of the trial judge that the Crown's servants were negligent, but declined to hold that such negligence amounted to gross negligence (*faute lourde*). On the interpretation which they placed on clauses 7 (Locke J. dissenting) and 17 of the lease, they held that those clauses must

be read as barring the company's action and as entitling the Crown to indemnity in the other actions. They accordingly dismissed the company's petition, confirmed the judgments maintaining the petitions in the five other cases, and condemned the company to indemnify the Crown in respect thereof.

1951. November 12, 13, 14, 15, 19 and 20. *Geoffrey Cross K.C.*, *Hazen Hansard K.C.* (of the Canadian Bar) and *R. O. Wilberforce* for the appellant company. The result of the decision of the Supreme Court is that the appellants not only receive no compensation for the loss of their own goods, but that they have also to pay for the loss suffered by the other suppliants. It is conceded that the loss was caused by the negligence of the Crown's servants. The questions therefore are, first, whether as a matter of construction clauses 7 and 17, or either of them, exempted or purported to exempt the Crown from liability for negligence in carrying out its obligations under the lease. It is finally a question of construction. If the Board are of opinion that as a matter of construction those clauses did not exempt the Crown, that is an end of the matter. If, however, the Board think that the Supreme Court were right in their construction of either or both of the clauses, and that they did have the effect of barring the appellants' claim and also of making them liable to indemnify the Crown against the loss sustained by the others, then the second problem arises, namely, whether the negligence was gross (*faute lourde*). Thirdly, assuming that it was *faute lourde*, were the Exchequer Court right in holding that a stipulation against the consequences of *faute lourde* is not valid under the law of Quebec? That, also, is a question of construction.

All that the parties really had in mind in so framing clause 17 of the lease was that something might be done by the lessee under the lease which might involve the Crown in claims by third parties. The claim for negligently carrying out the repairing work ought to be treated as falling under clause 8, and nothing can be excluded under clause 7 which falls under clause 8. Clause 7 is only intended to exclude the implied contractual obligations of the Crown under the Quebec Civil Code.

Citations from the English law do not appear to have any direct bearing on the problem. In English law, provided that it is expressed with sufficient clarity, the consequences of negligence can be excluded; even of gross negligence, falling short of fraud. That would not be the case in Lower Canada if the textbook writers and the authorities are right. The problem appears

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to be whether the old French law has endured in the Quebec law today in respect of *faute lourde*, which differs in that respect from English law. [Reference was made to articles 1012 to 1021 of the Quebec Civil Code, which cover the obligations and rights of a lessor.]

Clause 7 of the lease does not exclude any claim which can be brought under clause 8. This claim for negligently carrying out the repairing obligation, which is a breach of that obligation, can be brought under clause 8 and sued for under article 1641 (3) of the Civil Code, just as much as a claim for damages for failure to repair altogether, or a claim for consequential damage to the goods through failure properly to repair. They come under clause 8, and no distinction can be drawn between them. Assuming that that is wrong, and assuming that a claim for negligently repairing cannot be brought under clause 8, and can only arise as a pure delictual claim under article 1053 of the Civil Code, then it is submitted that clause 7, interpreted in the light of the English authorities, which, it appears, are accepted in Canada, can be given a perfectly sensible meaning if it is read as confined to the exclusion of claims arising under the implied contractual obligations of the Code: articles 1912 (3), 1614 and 1617 coupled with 1616.

With regard to clause 17, what the Crown has to show under this clause is, first, that a claim for negligently carrying out the repairing covenant could be said to be attributable to the execution of these presents, etc., and secondly, that if it can, there is no other sensible meaning that can be given to it. If there is a reasonable ambiguity, the appellants should have the benefit of it: it is for the Crown to establish its case. [Reference was made to *James Durnford & Sons Ltd. v. Great Western Ry. Co.*¹ and to *Alderslade v. Hendon Laundry Ltd.*²] Prima facie, the courts would approach such a clause as clause 17, if it does not expressly refer to negligence, by thinking that it would not cover it. The particular problem which arose in the *Alderslade* case² does not really arise here. There are a number of sources other than negligence from which claims might have arisen which would have been covered by clause 17, as appears when that clause is read in conjunction with the whole of the other provisions of the lease. Examples of such claims by third parties against the Crown, and not arising from negligence of its servants, and which

¹ (1927) 43 T.L.R. 527, 679; 44 T.L.R. 415.

² [1945] K.B. 189.

would be covered by clause 17, are, inter alia, (a) claims regarding the right to possession or occupation of the shed; (b) claims arising out of alleged improper construction of the loading platform and canopy, or failure to maintain them; (c) claims arising out of the use in common of a portion of the premises by the appellants and the public generally; (d) claims arising out of the liability imposed by law on the owners of property, e.g., under article 1055 of the Civil Code.

The broad language in the opening of clause 17 is in any event restricted by the concluding language of the clause, and the claims by the third parties do not fall within the latter words. On a proper construction, clause 17 refers to the acts or defaults of the appellants as lessee in respect of which it is reasonable that the Crown should seek indemnity, and do not extend so as to make the appellants chargeable for the negligence of the Crown towards third parties.

A. J. Campbell K.C., D. W. Mundell K.C. (both of the Canadian Bar) and *Gahan* for the Crown. It should be borne in mind that the lessor is the Crown, that at common law the Crown is not liable in tort, and that in Canada that rule still exists save to the very limited extent to which it has been superseded by section 19 (c) of the Exchequer Court Act, which provides that the only liability of the Crown is for the negligence of any officer or servant. That is the whole law of the Crown's liability for torts in Canada, and that is of some significance when approaching the interpretation of clauses 7 and 17 of the lease. The construction of the lease may also be assisted by considering the intention of the parties. It is clear that by clause 7 the Crown desired to relieve itself of some liability for damage or injury to physical property which would have existed if clause 7 had not been so framed; and clause 17 also provided that the lessee should assume some liability which the Crown would otherwise have had. It is common ground that this contract has to be interpreted in accordance with the Civil Code of Quebec. That may have a two-fold bearing; it has the significance that when the parties contracted they are presumed to have known what the law of Quebec was, and, secondly, the canons of construction of the civil law rather than those of the common law must be taken into consideration. In France under the Code Napoléon, and in Quebec under the Civil Code, all civil law is dependent on two factors, *faute* and *prejudice*: we are only concerned with *faute*.

In this case the Crown could have been liable in two ways: (i) either under section 19 (c) of the Exchequer Court Act, or

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(ii) on breach of contract. For breach of contract liability of the Crown depends on *faute* of the same kind and of the same degree as it would in the case of *delict*. That *faute* may be presumed to exist, as in the case of a simple failure to perform an obligation, or it may exist, as in the present case, by reason of the improper performance of the contractual obligations.

In broad, clear and unequivocal language clause 7 bars the appellants' claim, which falls squarely within its terms: *any* claim for damages of *any* nature. The burden is on the appellants to show that it does not apply. The clause extends to *faute* (negligence). The parties would have in contemplation the liability of the Crown for damage to physical property which might be expected to arise in the carrying out of the provisions of the contract. They would wish to cover the probable and not the remote sources of liability. Unless clause 7 extends to negligence it would be rendered otiose, void of substantial content and would be completely out of harmony with clause 17. Clause 8 was inserted simply for the purpose of adding to the obligation of the lessor to make the larger repairs (articles 1612 (2) and 1613 of the Civil Code) the obligation of making the minor repairs (article 1635). If, therefore, as is suggested by the appellants, clause 7 applies to what they term the implied covenants, including the implied covenant to maintain (article 1612 (2)) and the implied covenant to repair (article 1613), the extension of these obligations by clause 8 simply to include the minor repairs would not in any way affect the application of clause 7. Moreover, there is no logical or juridical reason to make a distinction between the provisions of the lease and the so-called implied covenants. They must be taken as a whole to determine the position of the parties and not one divorced from the other.

The instances of possible application of clause 7 suggested by the appellants are of such a minor or exceptional nature, or are so strained an application of the language of clause 7, as to make it necessary to conclude that it was another and more probable source of liability, namely, negligence, which was meant to be covered by the wide and all-embracing language of clause 7. Clause 8 can be interpreted so as to conserve to the lessee all its recourses for violation of the obligations of the lessor other than claims for damage to physical property. Thus the lessee could sue to force repairs to be made, could obtain all authorization to make them an expense of the lessor, and could obtain rescission of the lease, and reduction of rent, and, by appropriate action be relieved from the obligation to pay rent. In any event, the

question is not how far one can extend or restrict the phrase "the lessee shall not have any claim or demand against the lessor for detriment, damage or injury to the shed," but whether the present claim is a claim for detriment, damage or injury, which it clearly is.

The proper interpretation of clause 17 makes it necessary to conclude that clause 7 has the meaning which the Crown attributes to it. It would be entirely illogical for the appellants to be liable to indemnify the Crown against its liability to third parties because of the fault and negligence of its servants and yet permit the appellants to claim from the Crown their own damages attributable to the same cause, namely, the negligence of the Crown's servants. Clauses 7, 9 and 17 must be read together. The purpose was to put the appellants as regards liability in the same position as if the Crown's servants were its servants, and as regards the subject-matter of clause 7 they agreed that the risk of loss should be borne by them, the appellants.

It is submitted that the appellants state the rule with reference to ambiguity much too broadly. The relevant articles are 1013 to 1021, inclusive. Before article 1019 can be applied there must exist two reasonable interpretations. Here the only reasonable interpretation is that given by the Crown. The interpretation of the appellants is strained and would only apply to exceptional cases which could not, in the light of the broad and all-embracing language used and of the probabilities, have been the prime consideration for inserting the clause in the contract. Care should be taken in applying the language of English decisions to a case to be determined under the Civil Law principles and under the limited liability of the Crown under section 19 (c) of the Exchequer Court Act. The real question is what liability did the parties intend to exclude.

It is common ground that a party may oblige himself to do something and yet stipulate that he will not be liable for his fault not amounting to dol. It is also common ground that it makes no difference whether the faute is contractual or delictual. It would of course be implied that the Crown would carry out all its obligations with due care, including maintenance stipulated by clause 8. The point of clause 7 is that as regards damage to physical property the Crown is not to be liable if inadvertently its servants fail to exercise due care.

Turning to clause 17, that clause in broad, clear and unequivocal language requires the appellants to indemnify the Crown against its liability to third parties. Liability on the part of the

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Crown is clearly a subject within the contemplation of clause 17. The petitions of right taken by the other suppliants are obviously within the category of "all claims . . . by whomsoever made." The loss and damages sustained by the other suppliants were occasioned by and attributable to an action taken and a thing done by virtue (as a consequence of) the lease, e.g., the making of repairs. Clause 17 contemplates wrongful, i.e., negligent, acts, as there would be no need to be indemnified against the consequences of lawful acts. The words "attributable to the "execution of these presents" being referable to the grant of the lease by the Crown, the remaining words "or any action "taken . . ." refer to other actions or omissions of the Crown, namely, negligence. Inasmuch as the only liability of the Crown towards third parties would be for the negligence of its servants under section 19 (c) of the Exchequer Court Act, clause 17 applies to such negligence. The words "by virtue hereof," as defined by the dictionary, are apt to describe actions taken and things done by the Crown's servants as a consequence of the lease. The number of words used indicates that clause 17 was to be as all-embracing as possible.

If the Crown and the lessee were jointly and severally liable for damage caused by their joint negligence the Crown, if called on to pay by a third party would by force of the law alone have a right to be reimbursed to the extent of the lessee's negligence: article 1117 of the Civil Code. Therefore the insertion of clause 17 would only be necessary to make the lessee bear the consequences of the negligence of the Crown's servants. The instances of liability to which the appellants say that clause 17 applies either do not exist or are such remote possibilities as to make it necessary to conclude that they could not have been the prime consideration for inserting a clause of general application in the contract. Clause 7 frees the Crown from some liability, and therefore clause 17 must force the appellants to shoulder some liability of the Crown, i.e., in both instances a liability arising from negligence.

While authorities may not be of much assistance on the question of construction, reference may be made to *James Durnford & Sons Ltd. v. Great Western Ry. Co.*³; *Canadian National Ry. Co. v. La Cité de Montreal*⁴; *Rosin and Turpentine Import Company v. B. Jacob & Sons*⁵; *Commissaires du Havre de*

³ 43 T.L.R. 527, 679; 44 T.L.R. 415.

⁴ (1927) Q.R. 43 K.B. 409.

⁵ (1910) 102 L.T. 81.

Quebec v. Swift Canadian Company ⁶; *McCawley v. Furness Ry. Co.*⁷; *Forbes, Abbott & Lennard Ltd. v. Great Western Ry. Co.*⁸; *Calico Printers' Association v. Barclays Bank* ⁹; and *Turner v. Civil Service Supply Association*.¹⁰

Mundell K.C., following, dealt with the interpretation of section 19 (c) of the Exchequer Court Act, and in that connexion referred to *The King v. Anthony*.¹¹

Geoffrey Cross K.C., in reply. There is no ground for suggesting that, from the point of view of the person putting forward the clause, the Canadian courts have adopted a more lenient view of the construction of such clauses as 7 and 17 than have the English courts. It was held in *The Glengoil Steamship Company v. Pilkington*¹² that the exemption must be express and clear, and beyond peradventure cover the negligence to which it was said to apply. Reliance is placed on what Lord Greene M.R. said in the *Alderslade* case.¹³ Reading clauses 7 and 8 together, it is not reasonable to say that negligence in carrying out the repairing covenant is excluded by clause 7. With regard to clause 17, it should be stressed how very wide and unascertainable the liability of the appellants may be if the Crown's construction is right, for they might be liable for almost unlimited damages if the fire had extended. In clause 17 there are no general words such as often appear in clauses of this kind, e.g., "from whatsoever cause"; it is carefully limited to claims based on or occasioned by or attributable to, etc. Those words can be given a perfectly intelligible meaning if they are limited to acts which as between lessor and lessee are lawful, but may give rise to claims by third parties. It is for the Crown to convince the Board beyond peradventure that the appellants are barred from recovering any damages in respect of the loss of their goods, and that they are bound to pay to the Crown what it has had to pay to other people by reason of its servants' negligence. There is that measure of ambiguity in the clauses which should constrain the Board to say that the Crown has not proved its case.

1952. January 21. The judgment of their Lordships was delivered by LORD MORTON OF HENRYTON.

This is an appeal, by special leave, from six judgments of the

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⁶ (1929) Q.R. 47 K.B. 118.

⁷ (1872) L.R. 8 Q.B. 57.

⁸ (1927) 138 L.T. 286.

⁹ (1931) 145 L.T. 51.

¹⁰ [1926] 1 K.B. 50, 58.

¹¹ [1946] S.C.R. (Can.) 569, 571.

¹² (1897) 28 S.C.R. (Can.) 146, 152.

¹³ [1945] K.B. 189, 192.

J. C. Supreme Court of Canada dated June 23, 1950, reversing in part
 1952 a like number of judgments of the Exchequer Court of Canada
 (Angers J.), which had maintained petitions of right against the
 Crown for damages arising out of a disastrous fire. It will be
 convenient to refer to the appellant company as "the company"
 and to the respondent as "the Crown."

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In the first of these six cases the company was suppliant, claiming from the Crown \$40,713.72 as the value of the property of the company destroyed in the fire. In the remaining five cases the suppliants were owners of other property destroyed by the fire. The suppliants in these five cases, and the amounts respectively claimed by them from the Crown, were as follows:—

J. H. Heinz Company of Canada	...	\$38,430.88
Canada & Dominion Sugar Co. Ltd.	...	\$108,310.83
W. H. Taylor Ltd.		\$3,670.25
Raymond Copping		\$1,662.37
Cunningham & Wells Ltd.		\$15,159.83

In addition to the present six cases, petitions of right were instituted against the Crown in some 250 other cases, involving additional claims arising out of the fire to a total amount of \$325,636.05, which petitions of right have remained in abeyance pending the outcome of these proceedings.

The events leading up to all these claims must now be set out. By an indenture of lease (hereafter called "the lease") dated November 18, 1940, the Crown leased to the company a piece of land on the western side of St. Gabriel Basin No. 1 of the Lachine Canal in the City of Montreal "together with the right "and privilege to occupy, use and enjoy, for the purpose of "receiving and storing therein freight and goods loaded onto "and/or unloaded from vessels owned and operated by the "lessee," the whole of a shed known as St. Gabriel Shed No. 1, and hereafter referred to as "the shed." The shed occupied the greater part of the said piece of land. The company was also granted "the right and privilege to construct, maintain and use, "at its own cost and expense and over and/or across the said "land, along the whole length of the southerly face of the said "shed, a loading platform approximately 14 feet in width, "and a canopy extending approximately 20 feet beyond the "southerly edge of the said platform." Between the land demised to the company and the St. Gabriel Basin No. 2 there lay a strip of land 30 feet in width. The term of the lease was 12 years from May 1, 1940, and the rent was over \$12,000 per annum. The lease was expressed to be "made and executed

“ upon and subject to the covenants, provisos, conditions and
 “ reservations hereinafter set forth and contained, and that the
 “ same and every of them, representing and expressing the exact
 “ intention of the parties, are to be strictly observed, performed
 “ and complied with, namely:—”. Then follow a number of
 clauses, some of which must be set out, as the decision of this
 appeal ultimately turns on the construction of clauses 7 and 17,
 and these two clauses must be considered in the light of the lease
 read as a whole. The more important clauses are as follows:—

“ 1. That the lessee will pay all rental herein reserved at the
 “ time and in the manner in these presents set forth, without
 “ any abatement or deduction whatever.

“ 5. That the lessor, his servants or agents, shall at all times
 “ and for all purposes, have full and free access to any and every
 “ part of the said land, the said shed and the said platform.

“ 6. That the said land shall be used for purposes in connexion
 “ with the lessee’s business, only, and for no other purpose or
 “ purposes whatever.

“ 7. That the lessee shall not have any claim or demand
 “ against the lessor for detriment, damage or injury of any nature
 “ to the said land, the said shed, the said platform and the said
 “ canopy, or to any motor or other vehicles, materials, supplies,
 “ goods, articles, effects or things at any time brought, placed,
 “ made or being upon the said land, the said platform or in the
 “ said shed.

“ 8. That the lessor will, at all times during the currency of
 “ this lease, at his own cost and expense, maintain the said shed,
 “ exclusive of the said platform and the said canopy.

“ 9. That the lessee shall, in addition to the payment of the
 “ yearly rental hereunder, at its own sole cost and expense,
 “ insure, concurrently with the execution of this lease or as soon
 “ thereafter as possible, and thereafter keep insured during the
 “ currency of this lease with an insurance company or companies
 “ satisfactory to the Minister of Transport the said shed against
 “ fire and other casualty in the sum of FORTY-EIGHT
 “ THOUSAND DOLLARS (\$48,000.00). . . .

“ 10. That the lessee shall before constructing or erecting the
 “ said platform, the said canopy or other structures, including
 “ alterations to the said shed, on the said land, submit to the
 “ General Superintendent plans or drawings showing the location
 “ and design and nature of construction of the said platform, the
 “ said canopy or such structures, and obtain his approval of such

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“ plans or drawings, and shall construct or erect the said platform, the said canopy or such structures on the location and in accordance with the designs as shown on the plans and drawings approved by the General Superintendent, and thereafter maintain the said platform, the said canopy or such structures in accordance with the designs respecting the same, and shall carry on the work of such construction and maintenance of the said platform, the said canopy and such structures at its own cost and expense and under the control and direction of the General Superintendent and to his entire satisfaction.

“ 12. That it is distinctly understood and agreed that this lease is granted subject to the condition that the said platform and the said canopy shall forthwith, upon termination of this lease in any manner, except as provided for in clause 18 hereof, be and become vested in title in the lessor without any payment of compensation to the lessee in respect of the said platform and the said canopy.

“ 16. That the parcel or tract of land, thirty (30) feet in width, situated between St. Gabriel Basin No. 2 and the said land may be used by the lessee in common with the public generally, it being understood and agreed, however, that the lessee shall, in the discretion of the Superintending Engineer and in accordance with his direction, have preference in the use thereof.

“ 17. That the lessee shall at all times indemnify and save harmless the lessor from and against all claims and demands, loss, costs, damages, actions, suits or other proceedings by whomsoever made, brought or prosecuted, in any manner based upon, occasioned by or attributable to the execution of these presents, or any action taken or things done or maintained by virtue hereof, or the exercise in any manner of rights arising hereunder.”

Pursuant to the lease the company took possession of the leased premises and continued to occupy them at all times material to the present litigation. A few days before May 5, 1944, the Department of Transport in Montreal, representing the Crown, received a request from the company to effect certain minor repairs to the premises, including the doors of the shed. An inspection was made and the work undertaken by the employees of the Department of Transport almost immediately.

At this time the shed contained a large variety of merchandise awaiting shipment, other goods stored there by third parties and a quantity of equipment belonging to the company. A number of trucks and motor vehicles were on the wharf delivering, or about to deliver, further goods for transport.

The shed was constructed of corrugated iron on a steel frame, and the shipping doors were hung on hinges bolted to the uprights of the frame. These uprights were in the form of steel "H-Beams," the flanges of which were one-quarter to three-eighths of an inch thick. The Crown's employees, having almost completed their work on the afternoon of May 5, had removed and straightened the upper hinge of one of the shipping doors which had to be replaced. These hinges had originally been affixed to the "H-Beam" with three-eighths inch bolts. When they came to replace the hinge in question the Crown's employees found that they had no three-eighths inch bolts with them, the smallest size being one-half inch in diameter. They elected to enlarge the three-eighths inch hole in the "H-Beam" so that it would take the half-inch bolt.

Inside the door, immediately opposite and a few feet distant from the "H-Beam" in question, were piled a number of bales of cotton waste. Having decided to enlarge the hole, the Crown's employees proceeded to make use of an oxy-acetylene cutting torch for this purpose. The operation of this torch involved the use of oxygen and acetylene gas, which are combined in a cutting-head under pressure and, when ignited, produce extremely high temperatures of from 5,500° to 6,300° Fahrenheit. The flame of the torch, at such temperatures, will cut through steel.

The use of such a torch in the vicinity of inflammable material is dangerous, since, apart from the heat of the torch itself, the operation of cutting the metal necessarily produces a shower of sparks or particles of molten metal which fly off at a tangent from the point of cutting. The Crown's employees directed the torch from the exterior into the interior of the shed. For the purpose of preventing sparks from entering the shed, they placed a board on the inside across the opening of the "H-Beam." This board was some three feet shorter than the beam and did not fit closely at the top because it was cut square whereas the roof of the shed sloped. There were accordingly openings at both the top and bottom of the beam through which sparks might escape. One of the workmen was stationed on the top of the bales of cotton waste and a pail of water was placed inside

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the shed. The operation of enlarging the hole involved using the torch for about three or four minutes. Sparks escaped into the shed. The bales of cotton waste caught fire and the flames spread rapidly to the other contents of the shed and consumed the whole. Hence the claims, already mentioned, by the company and others against the Crown.

Angers J., after hearing the evidence, found as a fact that the fire and resulting damage were caused by the gross negligence of the Crown's servants while acting within the scope of their duties or employment. The Crown had denied negligence, and had pleaded that the company's claim was in any event barred by the provisions of clause 7 of the lease. In third party proceedings the Crown relied on clause 17 of the lease as giving rise to a right of indemnity from the company against the claims of the other five suppliants.

The trial judge did not express any view as to the meaning of clauses 7 and 17 of the lease. It was not necessary for him to do so because, basing himself on the law of Quebec, which he reviewed exhaustively, he found that no clause would extend to relieve the Crown of liability for damages resulting from the gross negligence (*faute lourde*) of its servants. He accordingly refused to regard clause 7 as a bar to the company's action or to hold that clause 17 gave the Crown a right to indemnity in the other five cases. In the result he condemned the Crown to pay to the company and to the other five suppliants the damages respectively claimed by them, and he dismissed the third party proceedings brought by the Crown against the company. The amount of the damages was agreed and is not in issue.

The Supreme Court of Canada (Rinfret C.J., Rand, Kellock, Estey, Locke, Cartwright and Fauteux JJ.) by a majority of six to one (Locke J. dissenting) reversed the trial judge in the company's own case, and unanimously reversed the trial judge in the cases of the other five suppliants in so far as the third party proceedings of the Crown against the company were concerned. The Supreme Court concurred in the finding of the trial judge that the Crown's servants were negligent, but declined to hold that such negligence amounted to gross negligence (*faute lourde*). On the interpretation which they placed on clauses 7 (Locke J. dissenting) and 17 of the lease, they held that such clauses must be read as barring the company's action and as entitling the Crown to indemnity in the other actions. They accordingly

dismissed the company's petition, confirmed the judgments maintaining the petitions in the five other cases, and condemned the company to indemnify the Crown in respect thereof.

In view of the findings of the Supreme Court, the Crown does not now seek to deny that its servants were negligent, but contends that their negligence was not gross negligence. Thus the issues arising on this appeal are whether the Supreme Court rightly construed clauses 7 and 17 of the lease, whether the Crown's servants were guilty of gross negligence and, if so, whether, by the law of Quebec, clauses stipulating immunity from or limitation of liability for the gross negligence of one of the contracting parties or his servants, or indemnity against such liability, are illegal and void. Counsel for the company conceded that such clauses were legal and effective if they applied only to negligence which did not amount to *faute lourde*. He opened the appeal by submitting that even if the negligence of the Crown's servants did not amount to "*faute lourde*," on the true construction of clauses 7 and 17 of the lease clause 7 afforded no answer to the company's claim against the Crown, and clause 17 did not entitle the Crown to the indemnity claimed in the third party proceedings. As this submission, if successful, would dispose of the appeal, their Lordships thought it well to hear it argued fully before hearing argument on the other issues in the case.

In considering this question of construction their Lordships have had in mind articles 1013 to 1021 of the Civil Code of Lower Canada and also the special principles which are applicable to clauses which purport to exempt one party to a contract from liability. These principles were stated by Lord Greene M.R. in *Alderslade v. Hendon Laundry Ltd.*¹⁴ as follows: "Where the "head of damage in respect of which limitation of liability is "sought to be imposed by such a clause is one which rests on "negligence and nothing else, the clause must be construed as "extending to that head of damage, because it would otherwise "lack subject-matter. Where, on the other hand, the head of "damage may be based on some other ground than that of "negligence, the general principle is that the clause must be "confined in its application to loss occurring through that other "cause to the exclusion of loss arising through negligence. The "reason is that if a contracting party wishes in such a case to "limit his liability in respect of negligence, he must do so in

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¹⁴ [1945] K.B. 189, 192.

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"clear terms in the absence of which the clause is construed as relating to a liability not based on negligence."

It appears to their Lordships that none of the judges of the Supreme Court regarded this passage as being in any way in conflict with the law of Lower Canada, and Kellock J. observed¹⁵: "It is well settled that a clause of this nature is not to be construed as extending to protect the person in whose favour it is made from the consequences of the negligence of his own servants unless there is express language to that effect or unless the clause can have no operation except as applied to such a case."

Their Lordships think that the duty of a court in approaching the consideration of such clauses may be summarized as follows:—

(1) If the clause contains language which expressly exempts the person in whose favour it is made (hereafter called "the proferens") from the consequence of the negligence of his own servants, effect must be given to that provision. Any doubts which existed whether this was the law in the Province of Quebec were removed by the decision of the Supreme Court of Canada in *The Glenfoil Steamship Company v. Pilkington*.¹⁶

(2) If there is no express reference to negligence, the court must consider whether the words used are wide enough, in their ordinary meaning, to cover negligence on the part of the servants of the proferens. If a doubt arises at this point, it must be resolved against the proferens in accordance with article 1019 of the Civil Code of Lower Canada: "In cases of doubt, the contract is interpreted against him who has stipulated and in favour of him who has contracted the obligation."

(3) If the words used are wide enough for the above purpose, the court must then consider whether "the head of damage may be based on some ground other than that of negligence," to quote again Lord Greene in the *Alderslade* case.¹⁴ The "other ground" must not be so fanciful or remote that the proferens cannot be supposed to have desired protection against it; but subject to this qualification, which is no doubt to be implied from Lord Greene's words, the existence of a possible head of damage other than that of negligence is fatal to the proferens even if the words used are prima facie wide enough to cover negligence on the part of his servants.

With these principles in mind, their Lordships turn to a

¹⁵ [1950] S.C.R. (Can.) 550.

¹⁶ (1897) 28 S.C.R. (Can.) 146.

consideration of clause 7, and they will first consider its language apart from the contents of clause 8, which immediately follows it. The claim of the company in the present case is "a claim . . . against the lessor for . . . damage . . . to . . . goods . . . being . . . in the said shed," and would therefore *prima facie* be barred by clause 7. It is, however, a claim for damage admittedly caused by the negligence of the Crown's servants. Their Lordships must therefore consider the third question stated above, and in considering this question it is necessary to bear in mind that the only liability of the Crown in the Province of Quebec in respect of claims arising *ex delicto* is based on section 19 (c) of the Exchequer Court Act, R.S.C. 1927, c. 34, as amended. That section is in the following terms:—

"The Exchequer Court shall have the exclusive jurisdiction to hear and determine the following matters:—

"(a) . . .

"(b) . . .

"(c) Every claim against the Crown arising out of any death or injury to the person or property resulting from negligence of any officer or servant of the Crown while acting within the scope of his duties or employment."

Thus the field for claims against the Crown, not based on negligence and coming within clause 7, is not a very wide one, but counsel for the company has given the following instances of such claims:—

1. Claims under article 1614 of the Civil Code for "defects or faults in the thing leased which prevent or diminish its use, whether known to the lessor or not." There might be, says counsel, a defect in the construction of the roof of the shed, not known to the Crown, and as a result of this defect the roof might fall down and injure chattels in the shed which belonged to the company. A claim for damage to these chattels resulting from this breach of the lessor's obligation under article 1614 is not a claim based on negligence and it would be barred by clause 7.

2. Claims under article 1612 (3) of the Civil Code. Suppose, for example, says counsel, that the Crown were to authorize a third party to carry out some operation on adjacent land which caused damage to the shed. In that event, again, the company would have a claim for damages, not based on negligence, which would be barred by clause 7.

3. Claims for a reduction of the rent, by the joint operation of articles 1617 and 1660 of the Civil Code, if, for instance, a trespasser caused damage to the shed by setting part of it on

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fire, and the lessee's right of action for damages against the trespasser proved to be ineffectual. Counsel for the Crown contended that a claim for a reduction of the rent would not fall within clause 7, but their Lordships think that such a claim, although it would not be a claim for "damages" might fairly be described as "a demand against the lessor for . . . damage . . . of any nature . . . to the said shed" within the meaning of clause 7.

It was contended on behalf of the Crown that these instances of possible claims for damages were fanciful and remote, and would not have been within the contemplation of the parties when the terms of the lease were agreed. No doubt there may be cases in which it may be difficult to draw the line. In the present case, however, their Lordships are not prepared to assume that the obligations imposed on lessors by the Civil Code were not in the minds of the parties. They think that the Crown may well have desired to protect itself from claims for damage arising out of any breach of these obligations, and yet may not have intended to go so far as to stipulate for protection from claims for damage resulting from the negligence of its servants.

So far, clause 7 has been considered apart from clause 8, but these two clauses must be read together, according to the ordinary principles of construction. So reading them, it appears to their Lordships most unlikely that clause 7 was intended to protect the Crown from claims for damage resulting from the negligence of its servants in carrying out the very obligations which were imposed on the Crown by clause 8. It is difficult to imagine the Crown saying to the company, when the lease was being negotiated: "Notwithstanding that the Crown agrees to maintain the shed, at its own expense, throughout the term of the lease, and notwithstanding that such an agreement implies an obligation to use due care in its performance, if the Crown's servants set about the work of repair in such a negligent manner that the shed and all the goods therein are destroyed, you are to have no claim for damages against the Crown," and if the Crown had made such a suggestion, it seems unlikely that the company would have accepted it.

Counsel for the Crown submitted that inconsistency between clauses 7 and 8 would be avoided if the former clause were read as barring claims for damages for non-feasance or misfeasance under clause 8, but leaving open to the company any claims for specific performance which it might make as a result of non-feasance, under article 1641 (1) and (2) of the Civil Code. This

is not an impossible construction of clause 7, but it appears to their Lordships to be a somewhat strained and artificial construction. Counsel for the Crown also relied on the fact that under clause 9 the company was bound to insure the shed, as an indication that the Crown did not intend to be liable for any damage to the shed, howsoever such damage might arise. This argument is not without force, as applied to the shed, but clause 9 makes no reference to goods within the shed.

Their Lordships will shortly consider how far the construction of clause 7 is affected by clause 17, for they entirely agree with the view expressed by the majority of the Supreme Court as to the close inter-relation of these two clauses. If, however, clause 7 were to be considered apart from clause 17, their Lordships would conclude that, even if the case is put at its highest in favour of the Crown, the Crown has failed to limit its liability in respect of negligence in clear terms. They would therefore decide against the Crown in accordance with the principles already stated.

Their Lordships now turn to clause 17, and observe at the outset that if the Crown's contention as to this clause is correct, it imposes a very remarkable and burdensome obligation on the company. However widespread may be the destruction caused by the negligence of the Crown's servants in carrying out the Crown's obligations under clause 8, the whole of the damage must be paid for by the company. In the present case the claims are heavy, and it is obvious that the damage caused by a fire such as this might be even greater. Such a liability for the negligence of others must surely be imposed by very clear words, if it is to be imposed at all.

The opening words of clause 17 are certainly very wide: "That the lessee shall at all times indemnify and save harmless the lessor from and against all claims and demands, loss, costs, damages, actions, suits or other proceedings by whomsoever made, brought or prosecuted." They are, however, considerably narrowed in their scope by the words which follow. These words limit the application of the clause to claims, etc., "in any manner based upon, occasioned by or attributable to" any one of three specified matters, namely: (1) "the execution of these presents"; (2) "any action taken or things done or maintained by virtue hereof"; (3) "the exercise in any manner of rights arising hereunder."

Are these words, in their ordinary meaning, wide enough to

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cover the negligent act of the Crown's servants, which caused the damage now under consideration?

The Chief Justice appears to have placed some reliance on the words "occasioned by or attributable to the execution of "these presents," treating "execution" as synonymous with "performance," but their Lordships are unable to take that view. They think that the words "execution of these presents" refer only to the signing and sealing of the lease. This is the usual meaning of these words, and the word "executed" is used in the same sense at the end of the document, where it is stated that "the lessee has executed these presents." Their Lordships think that by this phrase the Crown must have desired to protect itself against third parties claiming that they had contractual rights against the Crown which had been violated by the execution of the lease and the resulting grant of various rights to the company.

The remaining part of clause 17 gives rise to questions of great difficulty. Counsel for the Crown submitted that the negligent act of the Crown's servants was covered by the words "any action taken or things done . . . by virtue hereof." They contended that the words "by virtue of" may fairly be construed as meaning "in consequence of," and that the act of the Crown's servants in enlarging the hole was done in consequence of the lease, none the less so because it was negligently done. They pointed out, quite rightly, that the intent of the clause was to protect the Crown against claims by third parties, and submitted (a) that the only acts which could involve claims against the Crown by third parties would be acts of the Crown's servants, and therefore the words in question must refer to, or at least include, acts of the Crown's servants; and (b) that the acts contemplated must be negligent acts, otherwise they would give rise to no liability to third parties.

Counsel for the company contended that this argument involved a strained and unnatural construction of the words in question and that the phrase "any action taken or things done . . . by virtue hereof" would naturally refer to the doing of an act in pursuance of some right or privilege conferred by the lease rather than to the doing of an act in performance of some obligation imposed by the lease. They further contended that even if the words in question could cover an act properly done in performance of an obligation imposed by the lease, they could not extend to cover an act negligently done in the course of carrying out such an obligation. They submitted the following

argument on the construction of clause 17. By the phrase "occasioned by or attributable to the execution of these "presents" the Crown was seeking to protect itself against the possible claims already mentioned, while by the rest of the clause the Crown was seeking to protect itself against possible liability to third parties occasioned by or attributable to acts of the company. The reference to the execution of the lease is closely linked up with the words which follow it. In executing the lease the Crown was conferring a large number of rights and privileges on the company. The party who is likely to "take "actions" or "do things" or "exercise rights" under the lease is the company. By clause 17 the Crown is saying, in effect, to the company: "Nothing that you do under the lease "is to involve the Crown in any liability. Third parties may "consider that they have a claim against the Crown by reason "of the Crown's act in granting to you the right of occupying the "shed, or by reason of acts done by you with the sanction of "the Crown, such as the erection of the loading platform and "canopy in accordance with plans approved by the Crown under "clause 10 of the lease, or the exercise of 'preferential' rights "under clause 16. If any such claim is made against the Crown, "and succeeds, you must indemnify the Crown." In support of this argument counsel referred to the latter part of article 1618 of the Civil Code as showing that the Crown might become a party to an action by a third party claiming some "right in or "upon the thing leased."

The choice between these two contentions is not an easy one, but their Lordships have come to the conclusion that the company's contention is to be preferred, for the following reasons. First, it gives the more natural construction to the words "any "action done by virtue hereof." It is at least doubtful whether these words can be applied to a negligent act done in the course of carrying out an obligation. Secondly, even if the words are wide enough to include such a negligent act, the principle laid down in the *Alderslade* case¹⁷ must be applied and their Lordships are inclined to think that on the company's construction, "the head of damage may be based on some ground other than "that of negligence," although the possible grounds are somewhat limited in extent. Thirdly, their Lordships think it is manifest that the meaning and effect of clause 17 are far from

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¹⁷ [1945] K.B. 189, 192.

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clear, and if this is so the Crown has failed to impose in clear terms the burdensome obligation which has already been described. There would have been no difficulty in inserting an express reference to negligence of the Crown's servants, in clauses 7 and 17, if these clauses had been intended to protect the Crown against the consequences of such negligence.

If their Lordships had agreed with the Supreme Court that clause 17 extended so far as to cover negligent acts of the Crown's servants, they might well have had to reconsider the provisional view already expressed as to clause 7, but as they have arrived at the contrary opinion, their provisional view as to clause 7, so far from being disturbed, is strengthened. It would seem unlikely that if negligent acts by the Crown's servants are outside the scope of one clause, they are within the scope of the other.

The result is that, after hearing an able argument as to the construction of the lease from both sides, their Lordships find that the Crown has failed to establish either its defence under clause 7 or its claim for indemnity under clause 17. This being so, no other question arises for decision on this appeal.

Their Lordships will humbly advise His Majesty that this appeal should be allowed, the orders of the Supreme Court in the petition of the company against the Crown and in the five third party proceedings should be set aside, and the orders of Angers J. restored. The Crown must pay the company's costs in each of these six petitions, here and in the courts of Canada.

Solicitors: *Lawrence Jones & Co.; Charles Russell & Co.*

PERPETUAL EXECUTORS TRUSTEES AND
 AGENCY CO. (W.A.) LD., AS EXECUTOR
 OF THE WILL OF PATRICK ANDREW
 CONNOLLY, DECD. APPELLANTS;
 AND
 GEORGE ALFRED MASLEN AND OTHERS . RESPONDENTS;
 AND
 COMMONWEALTH OF AUSTRALIA . . . INTERVENER.

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ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

Australia—Wool disposals scheme—Partnership—Sheep farmers—Assignment by partner of his beneficial interest—Death of that partner—Subsequent receipt of payment under wool disposals plan—Gift—Whether payable to assignees or to executors of deceased partner—Wool Realization (Distribution of Profits) Act, No. 87 of 1948, ss. 4, 7, 9, 10, 11, 29.

Appeal to Privy Council—Jurisdiction when no inter se point relied on—Commonwealth of Australia Constitution Act, 1900 (63 & 64 Vict. c. 12), s. 74.

By a deed of assignment dated June 17, 1946, the assignor, who died on December 28, 1946, and who had carried on a pastoral business as a company in equal partnership with another, assigned to the respondents "all his right title and interest in . . . (d) . . . "the benefit of all contracts and engagements and book debts to "which [the two partners] may be entitled in connexion with the "said business together with all other assets of the said business." A sum of money was paid in 1949 by the Australian Realization Commission to the appellants as the personal representatives of the assignor in his capacity as a former partner in a dissolved partnership as the share of that partnership in a distribution of sums under the Wool Realization (Distribution of Profits) Act, 1948, in respect of participating wool supplied by it, which sums were admittedly gifts to the recipients.

Held, that the sum paid by the commission under the Act was neither a debt nor an asset of the business, nor was it ever partnership property, but was a personal gift to the individual parties concerned, and that accordingly it did not pass under the assignment to the respondents.

Order of the High Court of Australia ([1950] 82 C.L.R. 101) reversed.

The decision in *Nelungaloo Pty. Ltd. v. Commonwealth of Australia* [1951] A.C. 34, that if an appellant insists in his appeal to the Board "on raising an inter se question, whether as part of

* *Present*: LORD PORTER, LORD SIMONDS, LORD OAKSEY, LORD REID and LORD RADCLIFFE.

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EXECUTORS
TRUSTEES
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CO. (W.A.)
LD., AS
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"his main ground of appeal or as part of an alternative ground of " appeal, he must obtain a certificate of the High Court" of Australia under section 74 of the Constitution Act, 1900, is not to be extended to embrace the view that if a point which may involve an inter se question has been raised at any time in the case, or even if it appears in the case presented by the appellants, the Board are precluded from considering the matter in the absence of a certificate of the High Court. Nor are the Board precluded from hearing the appeal because at some previous period an inter se point has been raised. Their jurisdiction remains provided that no inter se point is relied on before them.

Commonwealth of Australia v. Bank of New South Wales [1950] A.C. 235, *Nelungaloo Pty. Ltd. v. Commonwealth of Australia* [1951] A.C. 34, and *Grace Brothers Pty. Ltd. v. Commonwealth of Australia* [1951] A.C. 53 considered.

APPEAL (No. 31 of 1951), by special leave, from an order of the High Court of Australia (December 5, 1950), which, by a majority, reversed an order of Walker J. in the Supreme Court of Western Australia (June 14, 1950).

The following facts and statutory provisions are taken from the judgment of the Judicial Committee:—The appellants were the executors of the will of one Patrick Andrew Connolly, who died on December 28, 1946, and had until June 30 of that year been in equal partnership with one Claude Ashley Laffer in a pastoral business in Western Australia known as the Mardathuna Pastoral Co. (hereinafter referred to as "the company"). By a deed dated June 17, 1946, and operating from July 1 of that year, Mr. Connolly assigned the beneficial interest of his half share in the company to the respondents in equal shares as tenants in common. Since the question as to what the property assigned included was in dispute between the parties, the exact terms in which the assignment was made should be quoted in so far as they are material.

By clause 1 of the assignment it was provided that Mr. Connolly assigned to the respondents "all his right title and interest "in . . . (d) . . . the benefit of all contracts and engagements "and book debts to which Patrick Andrew Connolly and Claude "Ashley Laffer may be entitled in connexion with the said business together with all other assets of the said business." The said business referred to was that of the company. By another deed dated October 2, 1946, Mr. Laffer assigned his half share to the first of the respondents. Mr. Laffer's assignment was in no wider terms than that of Mr. Connolly's and need not be further referred to.

Under section 51 of the Commonwealth of Australia Constitution Act, 1900, which by (vi) and (xxxi) gave power to the Commonwealth to make laws for the naval and military defence of the Commonwealth and of the several states and to acquire property on just terms from any state or person for those (among other) purposes, the Parliament of Australia passed the National Security Act of 1939. That Act empowered the Governor General in Council to make regulations, and in pursuance of those powers, on September 28, 1939, he made the National Security (Wool) Regulations in order to carry out an arrangement between the British and Australian Governments for acquiring the whole clip of Australian wool in connexion with the war with Germany. The regulations provided (A) that all wool grown in Australia should be compulsorily acquired, (B) that the regulations should be administered by the Central Wool Committee, (C) that all growers of wool should submit their wool to authorized persons for appraisement, and (D) that every grower should be paid the appraised value.

Regulation 30 was in the following terms: “(1) All moneys payable by the Government of Great Britain under the arrangement made by that Government with the Commonwealth for acquiring Australian wool shall be received by the Central Wool Committee and out of such moneys the Central Wool Committee shall defray all costs, charges and expenses of administering these regulations. (2) Any moneys which may be received by the Central Wool Committee from the Government of Great Britain under or in consequence of such arrangement over and above the purchase price payable by such Government thereunder for the wool and any surplus which may arise shall be dealt with as the Central Wool Committee shall in its absolute discretion determine.”

The company supplied wool under the regulations to the Central Wool Committee through the Westralian Farmers Co-operative Ltd., in some cases, and through Elder Smith & Co. Ltd., in other cases, until the compulsory acquisition of wool ceased on June 30, 1946. Stocks of wool, however, had been accumulated during the war, and an agreement for their orderly disposal was made between the Governments of the United Kingdom, Australia, New Zealand and South Africa. In Australia statutory approval to the agreement was given by the Wool Realization Act, 1945, which provided, inter alia, that the National Security (Wool) Regulations should be continued in force, that the disposal of stocks should

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be carried out by a company entitled "The Joint Organization," in which the shares were to be held by nominees of the four Governments, and that there should be set up an Australian Realization Commission, the subsidiary in Australia of the Joint Organization, to have and perform all the duties and all the powers, authorities and functions of the Central Wool Committee under the National Security (Wool) Regulations and other statutory regulations governing the disposal of wool and sheepskins.

That Act was followed by the Wool Realization (Distribution of Profits) Act, 1948, which provided for the distribution of any ultimate profits accruing to the Commonwealth under the wool disposals plan and for other purposes. The latter Act, in section 18, directed the preparation of a list showing (a) the persons who, in the opinion of the Commission, were entitled to share in the distributions under it, and (b) the appraised values of the wool in relation to which each such person was, in the opinion of the Commission, so entitled. Subject to certain provisions as to the exclusion of dealers, which were not material to the question in issue, the Act contained in section 4 a number of definitions, and in Part III clauses dealing with and determining the persons entitled to payment under the Act. Of those the more material were that part of section 4 which defined "participating wool," and sections 7, 9, 10 and 11. They were as follows:—

"4.—(1) . . . 'Participating wool' means wool appraised " under the National Security (Wool) Regulations (whether under " those Regulations when in force under the National Security " Act, 1939, or that Act as amended, or under those regulations " when in force under the Wool Realization Act, 1945, or that " Act as amended), being wool which was listed as participating " wool in the appraisalment catalogue used by the appraisers for " the purpose of that appraisalment."

"7.—(1) Subject to this Act, an amount equal to each declared " amount of profit shall be distributed by the Commission in " accordance with this Act.

"(2) There shall be payable by the Commission, out of each " amount to be distributed under this Act, in relation to any " participating wool, an amount which bears to the amount to " be distributed the same proportion as the appraised value of " that wool bears to the total of the appraised values of all " participating wool.

“(3) Subject to this Act, an amount payable under this Act in relation to any participating wool shall be payable to the person who supplied the wool for appraisalment.

“(4) Where two or more persons jointly supplied participating wool for appraisalment, those persons shall, for the purpose of determining their claims in relation to that wool in any distribution under this Act, be treated as one person.”

“9.—(1) Where any participating wool was supplied for appraisalment by—

“(a) a person whose affairs have at any subsequent time been administered, or are being administered, under any of the provisions of the Bankruptcy Act, 1924–48, by a trustee;

“(b) a person who has died and whose estate has at any subsequent time been, or is being, so administered; or

“(c) a personal representative in the administration of an estate which has at any subsequent time been, or is being, so administered,

“an amount which would otherwise be payable under this Act to the person who supplied the participating wool or his personal representatives shall, subject to this section, be payable to the trustee.

“(2) An amount received by a trustee by virtue of this section shall, for all purposes of the Bankruptcy Act, 1924–48, and of any instrument executed in pursuance of that Act, be deemed to be received by him in his capacity as trustee.

“(3) This section shall not apply in any case in which—

“(a) the creditors who were entitled to share in distributions by the trustee have been paid in full; or

“(b) the trustee was acting under a sequestration order, and that order has been annulled.

“10.—(1) Where participating wool was supplied for appraisalment by a company which is defunct, an amount which would otherwise be payable under this Act to the company may be paid by the Commission to such person as appears to the Commission to be justly entitled to receive it.

“(2) Where participating wool was supplied for appraisalment by a partnership which has been dissolved, an amount which would otherwise be payable under this Act to the partnership may be paid by the Commission to any former partner or

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“ partners (including the personal representatives of a deceased former partner).

“ (3) Where an amount has been paid in pursuance of this section, the rights, duties and liabilities of the person to whom it is paid in respect of the amount shall be the same as if it were part of the proceeds of a sale of the wool by the company or partnership, made at the time of the supply of the wool for appraisement.

“ 11. Subject to section nine of this Act, where participating wool was supplied for appraisement by a person who has died—

“ (a) any amount which would otherwise be payable under

“ this Act to that person shall be payable to the personal representatives of that person; and

“ (b) the rights, duties and liabilities of the personal representatives in respect of the amount shall be the same as if it were part of the proceeds of a sale of the wool by the deceased person made at the time of the supply of the wool for appraisement.”

To those must be added section 29, which was in the following terms:—

“ 29. Subject to this Act and the regulations, a share in a distribution under this Act, or the possibility of such a share, shall be, and be deemed at all times to have been, absolutely inalienable prior to actual receipt of the share, whether by means of, or in consequence of, sale, assignment, charge, execution or otherwise,”

and section 21 (1), which provided that the payment should reach the participants through their several brokers.

In those circumstances a sum of £2,132 9s. 2d. was, towards the end of 1949, paid through a firm of brokers to the appellants, as the personal representatives of Mr. Connolly, in his capacity as a former partner of a dissolved partnership as the share of that partnership in a distribution of sums payable under the Act in respect of participating wool supplied by it. Later on, a further sum of £562 14s. 11d. was paid to the respondents through other brokers as representing another share of a distribution of sums payable in respect of wool for appraisement supplied by the partnership.

The respondents on the one hand, and the appellants and Mr. Laffer's representatives on the other, claimed to be entitled to those two sums, and in those circumstances the latter took out originating summonses in the Supreme Court of Western Australia

for the purpose of ascertaining to whom those sums were properly payable. All parties agreed that meanwhile the moneys should be held in trust pending the conclusion of the proceedings. In the Supreme Court of Western Australia (Walker J.) the issue was determined in favour of the plaintiffs' claim, but the High Court (Latham C.J. and Kitto J.; Fullagar J. dissenting) reversed that decision.

1951. October 16, 17 and 18. *T. S. Louch K.C.* (of the Australian Bar), *Dingle Foot* and *Ralph Millner* for the appellants. The decision in this appeal affects all sheep farmers in Australia who carried on business in partnership during the war years 1939 to 1946 where for any reason such partnership has been dissolved. In 1939 the British Government asked the Australian Government to make available the Australian wool clip for war purposes, and by appropriate regulations the Commonwealth Government compulsorily acquired the whole of the Australian wool clip for 1939 to 1946. Each farmer submitted his wool for appraisalment, the value was appraised and he was paid that sum and had no right to any further payment. There was an arrangement between the British and Australian Governments, however, that if the wool, or any portion of it, was sold by the British Government, one-half of any profit on the sale would be handed back to the Australian Government. In fact a large profit was made, and the Commonwealth, although the owner of its share of that profit, determined to make a gift of it to the farmers who had supplied the wool, and to provide legislative authority for that purpose the Wool Realization (Distribution of Profits) Act, 1948, was passed. It is the clear intention of that Act that if a farmer who had supplied wool is alive and can be found, it is he who is to receive the payment. It is also clear from the Act that the payment is a gift.

Although this case originally turned on the question of the construction of the deed of assignment, it now appears that it turns on the proper construction of the Act of 1948. The wool acquisition scheme is referred to in *Commissioner of Taxes v. British Australian Wool Realization Association Ltd.*,¹ *Commissioner of Taxes v. Union Trustee Company of Australia Ltd.*,² and *John Cooke & Co. Pty. Ltd. v. The Commonwealth*,³ in which it was decided that the individual wool suppliers never had any right to any part of the Commonwealth's share of the profit, and

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¹ [1931] A.C. 224.³ (1924) 34 C.L.R. 269.² [1931] A.C. 258.

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that the distributions were in the nature of gifts by the Commonwealth to the suppliers of wool. [The relevant provisions of the National Security (Wool) Regulations, 1939; the Wool Realization Act, 1945; and the Wool Realization (Distribution of Profits) Act, 1948, were referred to.] Section 7 (3) is the vital subsection in the Act of 1948, and under it the money has to be paid to the person who supplied the wool for appraisalment, and the other sections are merely provisions to meet the position where that person has either gone bankrupt, died or dissolved his partnership, and concern the method of distribution. Section 29 of the Act of 1948, on which it is sought on behalf of the respondents to pin an inter se point, provides that a share or the possibility of a share under the Act shall be "inalienable prior to actual receipt of the share, whether by means of . . . assignment . . . or otherwise." If, however, the document does not assign to the respondents any rights at all in respect of the share, section 29 does not come into this case at all.

It is submitted that under section 10 (3) of the Act of 1948 the respondents are entitled to nothing, and that they fail in this action not because section 29 prohibits an assignment, but because in fact there never was an assignment of this payment to them. They fail because they were never "in"—never entitled to anything under section 10 (3). The Act operates beyond the immediate recipient to the ultimate donee, the person who is intended to get the payment. Latham C.J. was wrong in holding that the assignees of the share of a partner in a partnership which has been dissolved are entitled under the Act to receive the gift. The sums distributed were not "debts" at all, and the Chief Justice seems to have gone wrong in treating them as book debts; neither were they assets of the partnership. The order of Walker J. was right and should be restored.

No question arises in this appeal as to the limits inter se of the constitutional powers of the Commonwealth and those of any state or states, and no certificate of the High Court of Australia pursuant to section 74 of the Commonwealth of Australia Constitution is necessary.

J. P. Durack K.C. (of the Australian Bar) and *Gahan* for the respondents. If section 29 of the Act of 1948 is to be given the construction placed on it by the appellants, namely, that it prevents the assignment of the beneficial interest in this wool payment, it is submitted that the Parliament of the Commonwealth exceeded its powers in passing the section, and that the

section is ultra vires and inoperative. The only legislative power in such matters is vested by the Constitution in the Parliaments of the states. The powers of the Parliament of the Commonwealth, so far as relevant, must be found, it is submitted, in section 51 (xxxix) of the Constitution. Accordingly, if section 29 is to bear the construction for which the appellants contend, this appeal raises a question as to the limits inter se of the constitutional powers of the Commonwealth and those of the several states, and under the decisions of the Board the appeal cannot, by virtue of section 74 of the Constitution, be heard without a certificate of the High Court of Australia: *Commonwealth of Australia v. Bank of New South Wales*.⁴ And in *Grace Brothers Pty. Ltd. v. Commonwealth of Australia*,⁵ summing up the effect of *Nelungaloo Pty. Ltd. v. Commonwealth of Australia*,⁶ it was said that⁷ "any question whether the Commonwealth had "exceeded the powers conferred on it by section 51 was an inter "se question." The Board should interpret the position in the present case as being one in which an inter se question arises. Section 29 prevents the dealing with money by the individual; a state could have legislated to that effect—it had the right to.

On the merits of the case, the opening words of section 29 show that its operating provisions are conditional, and they have no application to cases arising under section 10 (2) and (3) of the Act of 1948, which expressly contemplate assignment. The money will not necessarily be received by the person beneficially; he may be a trustee. And there is no principle that the man who produced the wool should receive the payment, for section 7 says "supplied the wool," and such person need not necessarily be the grower. The legislature says that wherever the proceeds of the sale of wool on appraisalment shall go, so this money shall go. The deed of assignment assigns not only book debts in general, but the whole of the partnership assets, and also the benefit of any contract or arrangement. The assignment is sufficiently clear to include what would be the proceeds of the sale of wool made at the time of the supply of the wool for appraisalment. It is clear from the assignment that it was undoubtedly the intention of Connolly to give to the respondents everything—to assign everything—and where it is found that the legislature has made provision in the statute also for such assignments, then the respondents are entitled to the gift money in question.

⁴ [1950] A.C. 235, 262, 264.

⁵ [1951] A.C. 53.

⁶ [1951] A.C. 34.

⁷ [1951] A.C. 61.

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Section 29 must not be considered at all when one comes to interpret section 10 (3); but if it is regarded, it only has the effect of interfering with alienations by people who are trustees. Even if section 29 is construed to mean and include assignments of beneficial interests, section 10 (3) and other allied sections do not allow for a departure from the principle laid down in section 10 (3). That subsection clearly says that the respondents are entitled to this money, because they have a clear and definite assignment of all the assets of the partnership, and because section 10 (2) clearly lays down that one has to look in the case of a dissolution of partnership to whom, and in what way, these moneys are to be paid. Such moneys would undoubtedly be assets of the partnership; they could not be anything else. The moneys belong to, and should be paid to, the respondents.

G. E. Barwick K.C. (of the Australian Bar) and *Megaw* for the Commonwealth of Australia, intervening. The parties here both put the question of the power to enact section 29 of the Act of 1948 under section 51 of the Constitution, and that being so, on the decisions in the *Nelungaloo* case⁶ and the *Grace Brothers* case,⁵ any question as to the extent of the power under section 51 raises an inter se point. The appellants could answer the respondents by saying, inter alia, that section 29 is valid and on its proper construction precludes the assignment "carrying" the gift: that is the point at which I would suggest that the question of an inter se point would arise. There is a degree of similarity between the *Grace Brothers* case⁵ and the present one, and if the question of the validity of section 29 did arise it must, on the two above-cited decision of the Board, involve a question inter se.

T. S. Louch K.C. in reply. The first question is: does section 10 (3) provide that the former partnership to whom the money was paid should pay it to the people who were in partnership at the time of the supply of the wool as a gift from the Commonwealth. If the answer is Yes, that is an end of the case: it is merely a question of the construction of section 10 (3). The respondents, however, say that admittedly it goes to the partnership, but that it does so in the capacity of a book debt; and they go further and say that it is a book debt which must for all purposes and for all time be considered as a debt of the partnership at the time of supply, and as a book debt existed in 1946. They then say, if that is so, the assignment of 1946, which was of book debts, carries these moneys. They can only

⁵ [1951] A.C. 53.⁶ [1951] A.C. 34.

succeed in this action if they show that these moneys were part of the debts of the partnership, and were assets at the time the deed was executed. And as a matter of construction of the deed they will have to say that this deed deals with something which was not mentioned and was not in the contemplation of the parties.

December 10. The judgment of their Lordships was delivered by LORD PORTER. This is an appeal, by special leave, from an order of the High Court of Australia dated December 5, 1950, by which that court by a majority reversed a decision of Walker J. in the Supreme Court of Western Australia dated June 14 of the same year. Fullagar J., who dissented, would have upheld the order made by Walker J. in the Supreme Court.

In granting special leave their Lordships reserved to the respondents the right to object that no appeal lay in the absence of a certificate of the High Court under section 74 of the Australia Constitution Act, 1900, which withholds the right of appeal from a decision of the High Court on any question, however arising, as to the limits inter se of the constitutional powers of the Commonwealth and those of any state or states unless the High Court shall certify that the question is one which ought to be determined by His Majesty in Council.

[His Lordship then stated the facts and statutory provisions set out above and continued:] No question now arises as to that portion of the sums paid as are attributable to the half share in the partnership formerly belonging to Mr. Laffer, inasmuch as his representatives have not appealed to His Majesty in Council. But the right to Mr. Connolly's share is in dispute, the respondents claiming that it had been assigned to them, whilst the appellants maintain that it did not pass under the assignment.

Two questions, therefore, are posed for their Lordships' determination: (1) Is the appeal open to the appellants or does it involve an inter se question so that it is, for that reason, withdrawn from their Lordships' jurisdiction; and (2) if not, what is the true destination of these two sums and any other sums which may be paid by the Commission in respect of participating wool furnished by the partnership of Messrs. Connolly and Laffer?

Inasmuch as the first question might require the determination of the extent to which the right of appeal from the High Court to their Lordships' Board has been limited by section 74 of the Constitution Act, Mr. Barwick applied to, and obtained leave from, their Lordships to intervene on behalf of the

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Commonwealth of Australia, and their Lordships are much indebted for the assistance so given.

As to the question of the attitude which should be adopted in deciding an inter se matter, their Lordships have dealt fully with the problem in three recent decisions, namely, *Commonwealth of Australia v. Bank of New South Wales*,⁸ *Nelungaloo Pty. Ltd. v. Commonwealth of Australia*,⁹ and *Grace Brothers Pty. Ltd. v. Commonwealth of Australia*.¹⁰ In the first of those cases their Lordships decided that, if the determination of a case presented for their consideration involved the decision of an inter se question, the Board were precluded from hearing the appeal even though the High Court had found it possible to come to a conclusion in favour of the respondents without deciding the inter se point and though the point was raised only by the respondents before their Lordships' Board, provided that its decision was necessary if the matter in dispute was to be determined in favour of the appellants. In the two latter cases they went further. In the words of their judgment, as prepared by Lord Normand, they said¹¹: "Their Lordships are not disposed to allow exceptions " to the broad construction which they have already adopted, that " an appeal involving the determination of any inter se question " is excluded from the jurisdiction of His Majesty in Council " unless the appellant has obtained a certificate from the High " Court. . . . The appellant may accept the determination of " the High Court on the inter se question and present a petition " for special leave to appeal on other questions only. But if he " insists in his appeal on raising an inter se question, whether as " part of his main ground of appeal or as part of an alternative " ground of appeal, he must obtain a certificate from the High " Court under section 74."

If, then, an argument involving an inter se point is persisted in before their Lordships' Board, even as an alternative to an argument which does not raise an inter se question, the appeal is beyond their Lordships' jurisdiction.

The argument on behalf of the respondents in the present case on this point was based on the existence of section 29 in the Act of 1948. The appellants, they said, had relied on the provisions of that section both in the courts in Australia and in their case before the Board, and in any event that section involved an inter se question, and whether relied on or not formed a vital factor in the construction of the Act as a whole.

⁸ [1950] A.C. 235.

¹⁰ [1951] A.C. 53.

⁹ [1951] A.C. 34.

¹¹ Ibid. 52-3.

Their Lordships are not prepared to endorse the view that the appellants relied on the section as nullifying Mr. Connolly's assignment even in the courts of Australia. It is true that Fullagar J., in the High Court, made use of the section to point out the anomalies which would exist if the respondents' construction of sections 9, 10 and 11 prevailed, but the decision was given without the raising of or regard to any inter se question.

But whether or not an inter se question can be said to have been raised in Australia, a matter as to which their Lordships express no opinion, the appellants expressly declined to place any reliance on section 29 before their Lordships, and the Board are not prepared to carry their decision in the *Nelungaloo* case¹² further and to say that if a point which may involve an inter se question has been raised at any time in the case, or even if it appears in the case presented by the appellants, they are precluded from considering the matter. As was said in the *Nelungaloo* case¹²: "The appellant may accept the determination of the High Court on the inter se question." Nor are their Lordships precluded from hearing the appeal because at some previous period an inter se point has been raised. Their jurisdiction remains provided no inter se point is relied on before them.

In the present case, as has been said, the appellants expressly refrained from any argument based on section 29. In these circumstances the only argument left to the respondents with reference to this part of the case is the allegation that section 29 throws light on the construction of the earlier sections and, therefore, in some way, an inter se point is involved. Their Lordships cannot accept this view. Whatever construction may be placed on section 29, it is immaterial to the success or failure of the appellants' argument and, indeed, as will appear at a later stage, if the respondents' construction of Part III of the Act be correct, they would succeed and would no more require to refer to or rely on section 29 than would the appellants if their construction is adopted. It follows that no point involving an inter se question arises on the case as presented to the Board, but there remains for consideration the true effect of the provisions of the Act of 1948 and its impact on Mr. Connolly's assignment.

Admittedly, the two sums paid by the Commission are nothing but a gift. Under the Statutory Rules of 1939, rule 30, any sum over the purchase price was to be dealt with at the absolute discretion of the Central Wool Committee. The Wool Realization

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¹² [1951] A.C. 34, 53.

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Act of 1945 substituted the Commission for the Central Wool Committee and provided by section 9 (3) that it should have and perform all the duties and should have and might exercise all the powers, authorities and functions of that body. As a result of the passing of that Act the Commission was entitled to dispose of any moneys received in respect of participating wool over and above the price paid by the United Kingdom according to its absolute discretion. Whatever it did could not be challenged. No contract had come into being, no debt existed, and no action could be brought against the Commission. Any sum beyond the appraised value was therefore a gift. In these circumstances the Act of 1948 was passed to deal with the additional profit which, it may be, was formerly expected but was then known to exist.

The determination of the matters in issue in Australia, therefore, which are submitted to their Lordships' Board, falls to be decided on the true construction of the provisions of Part III of the Act. The appellants rest their argument on the terms of section 7 (3) and say that the share of the sums in dispute which they claim are payable in relation to participating wool, and accordingly payable to the persons who supplied it for appraisal. Messrs. Connolly and Laffer are the persons who supplied the wool jointly and are to be treated as one person (section 7 (3) and (4)). And accordingly the wool was supplied by a partnership which has been dissolved and the amount is properly payable to any former partner or partners, including the personal representatives of a deceased partner. The sums in dispute were, they say, properly payable to either of the claimants as representatives of Mr. Connolly or as representatives of Mr. Laffer, but not to the respondents.

The respondents, on the other hand, draw attention to the fact that the provisions of section 10 (3) are stipulated to be subject to the Act, and rely on the terms of sections 10 and 11 as distinguishing this from a case where a living partner claims the benefit of the payment. Section 10 (3), they say, no doubt authorizes payment, where a partnership is dissolved, to a former partner or his representatives. But when the money has been paid to him, his duties in dealing with it are prescribed by sections 10 and 11. Those duties, they contend, are to treat the payment as part of the proceeds of the sale of the wool made at the time of its supply for appraisal, i.e., as if the supplier

was entitled to the payment at that time. An identical obligation is, they maintain, imposed on a personal representative under section 11, since he is enjoined not to treat the sum paid as part of the personal estate but as having the quality of the proceeds of a sale made by the deceased supplier at the time when he furnished the wool for appraisalment.

Their Lordships have to choose between these two constructions. Obviously the recipient, whether he be a former partner or a personal representative, cannot keep the money for himself. If he be a member of a dissolved partnership, he must account to his former partner, and if he be a personal representative, he must treat the money as part of the estate which he is administering. But do the provisions go further and stipulate that it is to be dealt with as if it were the result of a contract or debt which came into existence when the wool was supplied for appraisalment? So to construe the wording would be to do violence to the admitted fact that it is a gift. No doubt the wording might be clearer, but *prima facie* the sums received are payable to the supplier and it is for the claimants to establish the contrary.

The correct view, in their Lordships' opinion, is that it is a true gift to the supplier of the wool. It is not, and never was, part of the assets of the partnership. If it were to be regarded as part of the assets of the partnership there would be no necessity for the provision in section 7 (4) that where two or more persons jointly supplied participating wool they were, for the purpose of determining their claims in relation to that wool in any distribution under the Act, to be treated as one person. As partners they would be so treated, but if they are individually entitled to a gift, a provision as to their joint right to receive payment would be required. In the opinion of the Board the respondents have not made out their claim.

No doubt there are a number of anomalies whichever construction be adopted, e.g., the provisions as to what is to accrue on the bankruptcy or death of the persons entitled, but to construe the provisions in the manner suggested by the respondents would bring about the peculiar result that, whereas, in the case of an existing partnership or company, partners or the board who had assigned their profits for the years in which the wool had been supplied would be entitled to keep the extra proceeds; in the case of a dissolved partnership or company the proceeds would pass to the assignees. Their Lordships cannot

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but think that a construction which effects so surprising a differentiation in the destination of the extra profit between existing and defunct bodies throws some light on the true intent of the section even though it can be claimed that the section itself is to some extent ambiguous.

As to the reliance placed by the respondents on the provisions dealing with the rights and obligations of the supplier in the case of death or bankruptcy, in their Lordships' view a distinction must be drawn between those cases where the property would normally pass from the recipient by operation of law and those where a positive act on his part is required if a change of ownership is to be created. No doubt section 13, which provides that the supplier of participating wool who has mortgaged his rights in respect of it shall be subject to the same liabilities in regard to the additional payment as he is to the sum contractually due upon appraisement, is in a somewhat different category, since the assignment by way of mortgage is a positive act on his part. But the section, so far from being a support for the respondents' contention, is a two-edged weapon, since it may well be contended that if their argument be sound, the extra sum paid would pass without the necessity of an express stipulation.

In reaching this opinion their Lordships must not be taken to determine that, where an assignment by the supplier to a third party clearly includes the payment in question, the assignor is nevertheless entitled to retain it. Such a decision might well involve a consideration of the terms of section 29. But it is not this case since, as their Lordships have said, the sum paid is neither a debt nor an asset of the business nor was it ever partnership property.

In their view it is a personal gift to the parties concerned, not passing under either assignment, nor is its destination affected by the terms of sections 10 or 11 of the Act of 1948.

In the result they reach the same conclusion as Walker J. in the Supreme Court of Western Australia and of Fullagar J. in the High Court, and will humbly advise His Majesty to allow the appeal and restore the judgment of Walker J. in so far as it applied to the appellants and respondents herein. The respondents must pay the appellants' costs of the appeal to their Lordships' Board and of the hearing in the High Court of Australia. The Commonwealth will bear its own costs.

Solicitors: *Bartlett & Gluckstein; M. L. Moss & Son; Coward, Chance & Co.*

[HOUSE OF LORDS.]

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July 17, 18,
 19, 23, 24;
Oct. 25.

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[TWO APPEALS.]

Revenue—Income tax—Profits of trade—Brewers—Notional outgoings in respect of tied houses—Claim to deduct—Income Tax Act, 1918 (8 & 9 Geo. 5, c. 40), Sch. D, Case I—Finance Act, 1940 (3 & 4 Geo. 6, c. 29), s. 17 (1) (2).

Certain public houses, the Sch. A assessment of which was about £12,000, were let on long leases to a brewery company by one of its subsidiary companies at rents amounting to £40,000 a year and sublet by it as "tied houses" at rents amounting to about £5,000 a year for the purpose of obtaining a better market for their beer, although by letting them without the "tie" they could have obtained higher rents.

Held, (1) that in computing its profits for the purposes of Sch. D to the Income Tax Act, 1918, the deduction which a brewery company is allowed to make by virtue of the decision in *Usher's Wiltshire Brewery Ltd. v. Bruce* [1915] A.C. 433, is not as the Crown contended a deduction of the rent actually paid to the freeholder under the long leases, reduced by the rents received from the sub-tenants, and (2) that accordingly, in the circumstances of the present case, the brewery company was not debarred by section 17 (1) and (2) of the Finance Act, 1940 (which prohibited it from making any deduction in respect of rent payable by it under a long lease) from making the deduction held in that case to be allowable.

Held, further (*per* Lord Morton of Henryton, Lord Reid, Lord Tucker and Lord Asquith of Bishopstone, Lord Radcliffe dissenting) that the deduction allowed by the rule in *Usher's* case (*supra*) is based, not on the actual rent paid by the brewery company but on the notional rents which could be obtained from "free" tenants (*viz.*, the rent "forgone") and that accordingly, for the purposes of Sch. D, the company is entitled to deduct from its profits the difference between those rents and the "tied" rents.

* *Present*: LORD MORTON OF HENRYTON, LORD REID, LORD RADCLIFFE, LORD TUCKER and LORD ASQUITH OF BISHOPSTONE.

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Per Lord Radcliffe: The relevant amount is the net Sch. A assessment and not the rents at which the houses could be let free from the "tie."

Decision of the Court of Appeal affirmed.

APPEALS from the Court of Appeal (Somervell and Singleton L.JJ. and Roxburgh J.).

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The facts, stated by Lord Morton of Henryton, were as follows:—This appeal arose out of additional first assessments made upon the respondents for the year 1942–3 in the sum of £32,033, and for the year 1943–4 in the sum of £32,790, under Sch. D, Case I, and section 125 of the Income Tax Act, 1918, in respect of their profits as brewers.

The respondents were the lessees of a number of licensed houses, the freeholder whereof was Tamplin's Licensed Properties Ltd., a wholly-owned subsidiary company of the respondents. These houses were held by the respondents as lessees under an agreement for lease dated June 1, 1938, for a term of 61 years computed from October 1, 1933. Some of the houses were retained by the respondents under their own management, but others were sublet by the respondents to "tied" tenants under agreements whereof a specimen was exhibited to the case stated. By clause "P" of each of those agreements the tenant and licensee of the public-house entered into the usual undertaking to purchase solely and exclusively from the respondents all the ale, beer, stout and other malt liquor and all wines, spirits and mineral waters which should be required for sale for consumption on or off the premises, and by clause "Q" he entered into an undertaking not to buy from any other source than the respondents.

It was common ground between the parties to this appeal that the terms of the said specimen agreement were those commonly to be found in tenancy agreements between brewers and their "tied" tenants and that the respondents entered into these tenancy agreements for the purpose of obtaining a better market for their beer. It was also common ground that if the respondents had chosen to let the same houses under agreements which omitted the "tie" clauses, but were in other respects the same as the specimen agreement, they could have obtained higher rents than those which they obtained from the tied tenants. Lastly, it was common ground that up to the date when the Finance

Act, 1940, came into operation, the facts just stated entitled the respondents to make a certain deduction in computing the amount of their profits under Case I of Sch. D of the Income Tax Act, 1918. The deduction was commonly called "the Usher deduction" or "the Usher allowance", as the right to make it was first established by the decision of the House of Lords in *Usher's Wiltshire Brewery Ltd. v. Bruce*.¹

The rent paid by the respondents for the houses in question was £40,000 a year. They let them for rents amounting to £5,329 a year. The Sch. A assessment amounted to about £12,000.

An appeal by the respondents on a case stated by the Commissioners for the Special Purposes of the Income Tax Acts was dismissed by the King's Bench Division (Croom-Johnson J.) and the determination of those commissioners, holding that the additional assessments were rightly made, was affirmed. The Court of Appeal having reversed this decision, the Crown appealed to the House of Lords.

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[TWO APPEALS.]

The respondent company carried on the trade of brewers and were the lessees of several licensed houses, the leases being "long leases" within the meaning of section 17 of the Finance Act, 1940. These they sublet to "tied" tenants. In computing their profits for the purposes of Sch. D, they claimed (a) as to one house, the Railway Inn, Abertillery, deduction of the difference between the rent which they could have obtained by letting it free of the "tie" (measured by the rent payable by them) and the rent received from the "tied" tenant, and (b) as to 17 other licensed houses, deduction of the difference between the gross Sch. A assessment on each house (which exceeded the rent payable by the respondents) and the rent received from the "tied" tenant. In the case of the Globe Hotel, Abertillery, the respondents held it on a lease for 870 years from 1852 at a rent of 1s. a year. The lease was assigned to them in 1918 for £14,900. The "tied" rent was £60 a year. The gross Sch. A assessment was £66 and the net Sch. A assessment £52 16s.

On appeal by the respondents against an assessment of £44,323, less £3,205 wear and tear, under Case I of Sch. D of the Income Tax Act, 1918, for the year 1946-7 in respect of their profits as brewers, the Commissioners for the Special Purposes of the

¹ [1915] A.C. 433.

H. L. (E.) Income Tax Acts rejected the first claim but admitted the second.
 1951 The King's Bench Division (Croom-Johnson J.) dismissed an appeal by the respondents and allowed a cross-appeal by the Crown. The Court of Appeal having reversed these decisions, the Crown appealed to the House of Lords.

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Grant K.C. and Reginald Hills for the Crown.

King K.C., Talbot K.C. and H. M. Allen for the respondents.

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The arguments are sufficiently stated in their Lordships' opinions.

Their Lordships took time for consideration.

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October 25. LORD MORTON OF HENRYTON [having stated the facts]:—My Lords, I must now state the difference of opinion which has given rise to this appeal. The Crown contends that by reason of the decision in *Usher's* case² the respondents were entitled, in computing their profits under Case I of Sch. D of the Income Tax Act, 1918, to deduct the amount of the rent paid by them to the freeholders for each licensed house let to a "tied" tenant less the rent received by them from each "tied" tenant. The Crown further contends that the rents paid by the respondents to the freeholders were "rents under long leases" within section 17 (1) of the Finance Act, 1940, and that by reason of subsection (2) of the same section the respondents ceased to be entitled to make the deduction just mentioned when the Act of 1940 came into force. The respondents agree that the rents paid by them to the freeholders are "rents under long leases" within section 17 (1) of the Act of 1940, but they say that the deduction which they were entitled to make under the decision in *Usher's* case² was not the difference between the rents paid by them to the freeholders and the rents received by them from the "tied" tenants, but the difference between the rents which could have been obtained for the licensed houses in question if they had been let to tenants free from the "tie" imposed by clauses "P" and "Q" already quoted and the rents which they in fact obtained from the "tied" tenants. They further contend that section 17 of the Act of 1940 has no effect on this right, since they do not seek to deduct any "rents under long leases"; what they were

² [1915] A.C. 433.

and are entitled to deduct in the case of each house is the notional rent which could have been obtained from a "free" tenant, less the rent paid by the "tied" tenant.

My Lords, it will be apparent that it is necessary to consider *Usher's* case² with some care, in order to ascertain what was in fact decided by your Lordships' House.

The rule which had to be considered by this House in *Usher's* case² is to be found in section 100 of the Income Tax Act, 1842, and is incorporated by reference in the Income Tax Act, 1853. It is rule 1 of the Rules applying to Cases I and II of Sch. D, and there is no material difference between that rule and the rule which applies in the present case, rule 3 (a) of the Rules applicable to Cases I and II of Sch. D of the Income Tax Act, 1918. Under both the old rule and the present rule it has to be decided whether the sum sought to be deducted is "money wholly and exclusively laid out or expended for the purposes of" the trade in question.

In *Usher's* case² the facts were the same as in the present case, except that the brewers owned the freehold of some of the houses let to tied tenants and were leaseholders of others of these houses. They appealed against an assessment made on them in respect of the profits of their trade, and claimed to have the assessment reduced by (inter alia) a sum of £2,134 14s. 6d., described by them as the "difference between rents of leasehold houses or Sch. 'A' assessment of freehold houses on the one hand, and rents received from 'tied' tenants on the other hand." It is worthy of note, however, that in the brewers' contention C³ it was pointed out that the tied tenants paid "a much less rent than the full annual value of the premises," and the following paragraph appears in a supplemental statement of facts agreed between the parties and signed in pursuance of an order of Horridge J.⁴: "B. In consideration of the 'tie' contained in the tenancy agreement the appellants let the tied houses at considerably less than their annual value or what they could get for them without such a tie and in the case of houses rented by them also below what they pay for the rent thereof themselves. Such letting is made by them deliberately and solely in order to get the trade which the using of such houses as tied houses affords and by means of so doing they are enabled to make a profit on their total trading transactions by reason of the increased sale of their beer and other goods. The letting at less than the annual value or head rent is not due to a change

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² [1915] A.C. 433.

⁴ Ibid. 436.

³ Ibid. 437.

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“ in the value of the premises. The figures in question represent
“ the difference between the rents received by the appellants on
“ the one hand and (i) in the case of their freehold houses, the
“ net Sch. A assessments; (ii) in the case of their leasehold
“ houses, the rents paid by them. If it should be held that in
“ case (ii) the net Sch. A assessment is the proper figure, it can
“ be ascertained.”

This House unanimously allowed the deduction claimed, as being money “ wholly and exclusively laid out or expended for the “ purposes of ” the brewers’ trade. But the opinions delivered must be studied with care, as two alternative views of these opinions have been put forward in argument. Counsel for the respondents contend that what was allowed to be deducted, both in the case of the freeholds and in the case of the leaseholds, was the difference between the rents which were in fact obtained from the “ tied ” tenants and the notional rents which could have been obtained if the same premises had been let free from the “ tie.” Counsel for the Crown, on the other hand, contend that the deduction allowed in *Usher’s* case,⁵ in the case of the brewers’ leasehold properties, was simply the rent paid to the freeholder less the rent received from the “ tied ” tenant. They deal with the deduction allowed in the case of the freehold properties by saying that it was simply the difference between the Sch. A assessment and the rent received from the tied tenant; that it was an “ anomalous ” decision; and that it has no application to the present case, because the respondents are leaseholders of all the houses now in question.

I now turn to the speeches in *Usher’s* case,⁵ in order to ascertain which of these contentions is entitled to succeed. Lord Loreburn said⁶: “ The next item which the brewery company “ seeks to deduct is £2,134 14s. 6d., which is the difference “ between the annual value or the rents which they pay to the “ freeholders of the tied houses on the one hand and the rents “ which they receive for the same houses from their tied tenants “ on the other hand. This difference arises because the tied “ tenants are bound by covenant to buy their liquor solely from “ the brewery company. In consideration of this ‘ tie ’ the “ tenants occupy at rents less than the annual value and less “ than the rents which the brewery company itself has to pay “ for the houses, and the sum claimed to be deducted must be “ taken to represent in each case the difference between the rents

⁵ [1915] A.C. 483.

⁶ *Ibid.* 445-6.

“ actually received from the tied tenants and the proper annual value. For no argument was offered to show that the rent paid by the brewery company is other than the proper annual value. And it is agreed that this letting at reduced rents is made solely to get the trade which the using of the tied houses affords, and so to swell the profits of the brewery business. On ordinary principles of commercial trading such loss arising from letting tied houses at reduced rents is obviously a sound commercial outlay. Therefore this item must be deducted.”

It is to be observed that Lord Loreburn treats the freehold and leasehold premises as being on the same footing, and the vital words are: “ the sum claimed to be deducted must be taken to represent in each case the difference between the rents actually received from the tied tenants and the proper annual value. *For no argument was offered to show that the rent paid by the brewery company is other than the proper annual value.*” This passage shows clearly, to my mind, that if the rent paid by the brewery company had been other than “ proper annual value ” it would not have been adopted as the figure from which the rent paid by the “ tied ” tenant was to be deducted, and I think that by “ proper annual value ” Lord Loreburn meant the rent which could have been obtained from a “ free ” tenant.

Lord Atkinson said⁷: “ As to the next item, it must be conceded that if the appellants had put into occupation of a house a manager, as distinguished from a tenant, who managed their trade in the way I have described, they would, under the authority of *Russell v. Town & County Bank Ltd.*,⁸ have been entitled to deduct the full annual value of the house as estimated under Sch. A, whether that house was a freehold or leasehold. I do not think it can possibly make any real difference in principle in respect to this right to deduct, if the salesman put into the tied house, to live in it (as he must do to obtain a publican’s licence), happens to be a tenant and not a manager, though the brewer no doubt occupies the house in the one case, because the occupation of the manager is his occupation, and not in the other; but the balance of the profits and gains of the brewer’s trade would, according to the methods of practical business men, be ascertained in the same way in both cases, i.e., by deducting from the receipts what it costs to earn them. Part of the cost to the brewer is, in the manager’s case, his salary, and possibly a discount on profits. In the case of the tenant

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“ it is the difference between the annual value of his, the brewer’s,
 “ freehold house and the rent he receives for it, and in his lease-
 “ hold house the difference between the rent he receives for it
 “ and the rent he pays for it, if that be equal to the full annual
 “ value under Sch. A. For the purposes of striking the balance
 “ of profits and gains the two cases are in principle undistinguish-
 “ able.”

Here, the vital words are “ in his leasehold house the difference
 “ between the rent he receives for it and the rent he pays for it,
 “ *if that be equal to the full annual value under Sch. A.*” The
 comments which I have just made as to Lord Loreburn’s words
 apply equally to Lord Atkinson except that the latter speaks of
 “ the full annual value under Sch. A ” instead of using the phrase
 “ the proper annual value.”

For the moment I pass over the opinion of Lord Parker of
 Waddington and turn to the opinion of Lord Sumner, where he
 said⁹: “ Next as to the rent. A trader who utilizes, for the
 “ purposes of his trade, something belonging to him, be it chattel
 “ or real property, which he could otherwise let for money, seems
 “ to me to put himself to an expense for the purposes of his trade.
 “ Equally he does so if he hires or rents for that purpose property
 “ belonging to another. The amount of his expense is *prima facie*
 “ what he could have got for it by letting it in the one case, and
 “ what he pays for it when hiring it in the other. Where he gets
 “ something back for it, while employing it in his trade, by
 “ receiving rent or hire for it in connexion with that trade, the
 “ true amount of his expense can only be arrived at by giving
 “ credit for such receipt. In principle, therefore, I think that in
 “ the present case rent forgone, either by letting houses, which
 “ the brewers own, to tied tenants at a low rent instead of to free
 “ tenants at a full rack rent in the open market, or by letting
 “ houses in the same way, which they hire and then re-let at a
 “ loss, is money expended within the first rule applying to both
 “ of the first two cases of Sch. D, and that upon the findings of
 “ the special case, which are conclusive, it is ‘ wholly and exclu-
 “ sively expended for the purposes of such trade.’ ”

Certain portions of this passage have been criticized as being
 too widely expressed; see, for instance, the observations of
 Viscount Maugham and Lord Russell of Killowen in *Lowry v.*
*Consolidated African Selection Trust Ltd.*¹⁰ Mr. King does not
 seek to rely upon these portions as establishing a wide general

⁹ [1915] A.C. 433, 469.¹⁰ [1940] A.C. 648, 663-4, 674.

rule. I think, however, it is plain that in the particular case before him Lord Sumner thought that the proper deduction to be allowed was the difference between the rent received from the "tied" tenants and the rent which could have been obtained if the houses had been let "to free tenants at a full rack rent in the open market." This difference he described as "rent forgone" and he regarded it as money "wholly and exclusively expended for the purposes of such trade."

I now turn to the judgment of Lord Parker of Waddington. He dealt with the point as follows¹¹: "My Lords, some of the "licensed houses which the appellants acquired for the purposes "of their trade were of freehold and some of leasehold tenure, "but the rent reserved in all the tenancy agreements on which "they have been let is less, in the case of freeholds, than the "annual value according to the Sch. A assessment, and, in the "case of the leaseholds, than the rent which the appellants themselves have to pay. The appellants claim to deduct, in the one "case, the difference between the Sch. A assessment and the rent "they receive, and in the other case the difference between the "rent they pay and the rent they receive. In other words, they "claim the Sch. A assessment value or the rent they pay as a "deduction, giving credit on the other side of the account for the "rent paid by the tenants of the tied houses. I am of opinion "that they are also right in this contention. Unless there is "some express prohibition the case appears to be covered by "*Russell v. Town & County Bank Ltd.*¹² . . . The right to make "the deduction, however, must of course carry with it the obligation to give credit for the rents received from the tenants of the "tied houses."

Counsel for the Crown in the present case rely upon this passage as supporting their contention, but I incline to the view that if there had been evidence that the rents paid by the brewers to the freeholders had been greater than the rent which they could have obtained from a "free" tenant, Lord Parker would not have allowed the brewers to deduct the whole of the difference. It is to be noted that he expresses no dissent from the views which had already been expressed by Lords Loreburn and Atkinson. Lord Parmoor did not deal specifically with this particular claim by the brewers, but he expressed no dissent from the views which had already been expressed by the other noble and learned Lords.

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My Lords, I shall first consider the case of the leasehold houses dealt with in *Usher's* case.¹³ The deduction in fact allowed was the deduction claimed by the brewers, namely, the difference between the rents paid to the freeholders and the rents received from the tied tenants; but in my view this deduction was allowed because, and only because, it represented the difference between the notional rent which could have been obtained from a free tenant and the rent obtained from the tied tenant, and if there had been evidence that the actual rent paid to the freeholder was higher or lower than this notional rent, the deduction would have been based on the notional rent and not on the actual rent. I think that this sufficiently appears from the passages which I have quoted from the speeches of Lords Loreburn, Atkinson and Sumner.

The point is not so clear in the case of the freehold properties, but as all the properties are leasehold in the present case it is not necessary to express a concluded opinion as to the view which this House would have taken in *Usher's* case,¹³ if there had been evidence that the Sch. A assessments were out of date, and that the rent which could be obtained from a "free" tenant was in fact higher or lower than the Sch. A assessment. I incline to the view that in this event the House would have discarded the Sch. A assessment as the basis. No one of the noble Lords appeared to think that there was any difference in principle between the freeholds and the leaseholds, and I believe that they adopted the Sch. A assessments merely because they assumed that these assessments accurately represented the rent which could be obtained from a "free" tenant. Lord Parker of Waddington discussed the question whether, in the case of the freeholds, the basis should be the gross or the net Sch. A figure, but I find it unnecessary to go into this matter, as no other member of the House discussed it in *Usher's* case,¹³ and your Lordships are not concerned with freeholds in the present case.

The result is that in my opinion the respondents are right in their contention that the *Usher*¹³ deduction is a notional figure less the rent actually paid by the tied tenant; and if this be the true view it is plain that the right to make this deduction is not affected by the Finance Act, 1940. This appeal must therefore fail, and it becomes unnecessary to consider the second submission of counsel for the respondents that the additional assessments are

¹³ [1915] A.C. 433.

bad in law, because the inspector made no "discovery" within the meaning of section 125 of the Income Tax Act, 1918.

It was suggested by counsel for the Crown that if *Usher's* case¹⁴ were to be heard today it would be decided differently, by reason of the difference in wording between rule 5 of the Rules applicable to Cases I and II of Sch. D of the Income Tax Act, 1918, and the corresponding rule in force when *Usher's* case¹⁴ was decided. I do not, however, find any foundation for this argument in the speeches of the noble Lords who decided *Usher's* case.¹⁴

I have based my opinion as to the effect of the decision in *Usher's* case¹⁴ simply upon the language used by those who decided it. I would add, however, that certain strange results would follow if the Crown's contention were accepted.

Assume that brewers hold a public-house as lessees for a term of 870 years from 1852 at a rent of one shilling per annum. These are the facts in the case of the Globe Hotel, Abertillery, one of the houses in question in the next appeal before your Lordships' House. Assume further that the house is let to a tied tenant at £60 a year and that the rent which could be obtained from a free tenant and the net Sch. A assessment are both £100 a year. If the Crown's contention is right, the brewers could never deduct anything under the decision in *Usher's* case,¹⁴ because the rent they pay is less than the rent they receive from the tied tenant; but if they had been freeholders, instead of being leaseholders for 870 years, they could have deducted £40 a year, both before and after the Act of 1940. This seems a strange and capricious result. If on the other hand the respondents' contention is right, the brewers could always have deducted £40 a year, as "rent for-
" gone " for the purposes of their trade.

Another reason for rejecting the Crown's contention arises from the decision of this House in *Fry v. Salisbury House Estate Ltd.*¹⁵ The Crown's contention is, in effect, that the right of the brewers under the decision in *Usher's* case¹⁴ is to treat the rent paid to the freeholders as an outgoing of the business and the rent received from the tied tenants as a receipt of the business; but the latter part of this contention cannot, in my view be reconciled with the *Salisbury House* case.¹⁵ Counsel for the Crown rely upon the explanation of *Usher's* case¹⁴ given by Lord Russell of Killowen in *Lowry v. Consolidated African Selection Trust Ltd.*¹⁶

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¹⁴ [1915] A.C. 433.¹⁶ [1940] A.C. 648, 672.¹⁵ [1930] A.C. 432.

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when he said: "So far as concerns the leaseholds the position " seems to present no abnormal features; it is a plain case of " entering actual income and actual outgoings "; but with the utmost respect to that great judge, I do not see how the receipts from the tied tenants can be computed as income from the brewing business for the purposes of Sch. D, in view of the decision in the *Salisbury House* case.¹⁷ Taxation in the case of each tied house would be imposed under Sch. A and under no other schedule. I prefer the exposition of *Usher's* case¹⁸ which was given by Lord Warrington of Clyffe in the case of *Hoare & Co. Ltd. v. Collyer*,¹⁹ where he points out that the deduction in *Usher's* case²⁰ was "rents forborne."

Counsel for the Crown submitted that a decision in favour of the respondents might have far-reaching results in many different types of business. I do not think so. In *Usher's* case²⁰ this House decided that in the very special case of a brewer's tied houses "rent forgone" was money wholly and exclusively "laid out or expended" for the purposes of the brewer's trade. I can find nothing in the facts of the present case to distinguish it from *Usher's* case,²⁰ and nothing in any Act passed since *Usher's* case²⁰ was decided which adversely affects that decision. It was in my view a decision upon a narrow point, exactly covering the present case. If any of Lord Sumner's observations are to be construed as laying down a broad general rule, I cannot find that that rule was accepted by the other members of the House or has been applied in any subsequent case.

For these reasons, which do not differ in substance from the reasons given by the Court of Appeal, I move that this appeal be dismissed with costs.

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LORD MORTON OF HENRYTON. My Lords, in my opinion the questions which arise on these two appeals are completely covered by the reasons which I have just given for rejecting the Crown's contentions in the case of *Nash v. Tamplin & Sons Brewery Brighton Ltd.*, and the appeals must fail.

I shall only add, to prevent any possible misunderstanding, that in the case of each of the licensed houses in question the

¹⁷ [1930] A.C. 432.

¹⁸ [1915] A.C. 433.

¹⁹ [1932] A.C. 407, 414.

²⁰ [1915] A.C. 433.

respondents were entitled, in computing their profits for the year in question for the purpose of Sch. D of the Income Tax Act, 1918, to deduct the difference between the rent which they received from their "tied" tenant and the rent which they would have received if the house had been let free from the "tie." Neither the respondents nor the Crown must necessarily accept either the gross or the net Sch. A assessment as accurately representing the latter figure; but it will, of course, save trouble and expense if they can agree a figure.

I move that these appeals be dismissed with costs.

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LORD REID. My Lords, the respondents in the first appeal hold a number of public houses on long leases from a subsidiary company and pay to that company a rent of £40,000. These public houses are let by the respondents as tied houses for rents which amount in all to £5,329, and the assessments of these public houses, for the purpose of Sch. A, amount in all to about £12,000. The respondents maintain that in the assessment of the profits of their brewery business for the purpose of Sch. D the decision of this House in *Usher's Wiltshire Brewery Ltd. v. Bruce*²¹ entitles them to a deduction of a sum equal to the difference between the amount of the tied rents received by them—£5,329—and either the amount of the rents which they could get if they let these public houses free of any tie (which I shall call the potential rents) or, alternatively, the amount of the Sch. A assessments. There is no finding as to what those potential rents would amount to, but it is clear that they would greatly exceed the tied rents and they might considerably exceed the Sch. A assessments. It is common ground that the facts of this case are indistinguishable from the facts in *Usher's* case,²¹ and there is no doubt that in *Usher's* case²¹ a deduction was allowed in respect of tied houses which were held by brewers under leases. But the appellants maintain that the deduction then allowed in respect of leasehold premises was of a different character. They maintain that the only deduction then allowed

²¹ [1915] A.C. 433.

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was a sum equal to the difference between the tied rents received by the brewers and the rents which were actually paid by the brewers to their lessors. At first sight the difference between these two contentions might seem to be of a minor character, and so it would be but for section 17 of the Finance Act, 1940.

Sections 13 to 17 of the Finance Act, 1940, appear to have been passed to deal with certain rents which had escaped taxation before that date. The reason for this immunity is to be found in *Fry v. Salisbury House Estate Ltd.*²² In that case a company owned a block of buildings and let out rooms in it as unfurnished offices. The rents which the company received exceeded the total Sch. A assessment of the building, and the Crown sought, unsuccessfully, to tax the amount of that excess as a profit of the company under Sch. D. The position then was that a tenant who paid rent which exceeded the amount of the Sch. A assessment of his premises paid to the Crown tax on the Sch. A assessment and no more; he was then entitled to deduct that tax from the rent which he paid to his landlord, but he could not deduct more than he was liable to pay, so he paid the excess of his rent over the Sch. A assessment without deduction of tax. The landlord could not be directly assessed; so the result was that no tax was payable by anyone on the excess rent. The effect of the Finance Act, 1940, was to make such excess rents taxable. The Act dealt differently with rents under short leases and rents under long leases, and it is unnecessary in this case to refer to those provisions which deal with short leases. Long leases are dealt with by section 17 and its effect is that a tenant can now deduct tax on the whole rent which he pays to his landlord. If the section stopped there the landlord would pay tax on all that he received, but the tenant would gain because he would have deducted tax from the whole rent and still only be liable to pay tax on the Sch. A assessment. In the ordinary case any such gain to the tenant is prevented by further provisions in the section. Before 1940 the tenant was entitled, in determining his profits under Sch. D, to deduct as an expense the whole rent which he paid, but section 17 now prohibits him from making any deduction in respect of rent payable by him under a long lease. I need not enter further into an examination of the complicated provisions of this section, because it is agreed that in the ordinary case the ultimate result is that the landlord now pays tax on the full amount received by him, whereas the amount of tax payable by the tenant is on balance unaltered.

²² [1930] A.C. 432.

I must now deal with the effect of section 17 on this case. Admittedly the brewers get the benefit of section 17 in that they can now deduct and retain tax on the whole £40,000 which they pay as rent. The question is whether the countervailing prohibition also applies to them. The section only prohibits the taxpayer from deducting in his Sch. D account any payment of rent under a long lease. So, if the deduction allowed in *Usher's* case²³ was a deduction of the rent paid by the brewer, either in whole or in part, that deduction is now prohibited by section 17. But if the deduction allowed in *Usher's* case²³ was not based on rent paid by the brewer but was based on something else—potential rent or annual value—then section 17 has no application to it and the deduction can still be claimed. It is for this reason that it is necessary to discover precisely what this House held to be the basis of the deduction allowed in *Usher's* case.²³

In *Usher's* case²³ the brewers had let to tied tenants a number of public houses, some of which they held on lease and some of which were freehold, and they claimed a number of different deductions. The two most important claims were²⁴: “(a) Repairs to tied houses—£1,004 0s. 10d.; (b) Difference “between rents of leasehold houses or Sch. A assessment of “freehold houses on the one hand, and rents received from tied “tenants on the other hand—£2,134 14s. 6d.” The commissioners held: “3. In common with other brewery companies “the appellants have from time to time in order to increase “their trade purchased licensed houses which they let to tenants, “one of the terms of such lettings being that the tenants should “buy from the appellants all the ale, beer, wines and spirits “sold in such tied houses. 4. The profits of the appellants are “made by brewing ale, beer and other articles and purchasing “spirits in bulk and selling these commodities partly to private “individuals, partly (to a limited degree) to free licensed houses, “and as to the greater part to the tenants of their tied houses. “All these profits of the appellants are included in the assess- “ment. Such profits are materially increased owing to the “possession by them of the tied houses in question and in con- “sequence of an increased sale of these commodities to the “tenants of those tied houses and to the fact that they are able “to obtain and do obtain for the same class of goods a higher “price from the tenants of their tied houses than they can obtain “or are able to obtain from their other customers. . . . 7. The

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²³ [1915] A.C. 433.²⁴ Ibid. 434.

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“ said premises have been acquired by the appellants and are
 “ held by them solely in the course of and for the purpose of
 “ their said business and as a necessary incident to the more
 “ profitably carrying on of their said business. The possession
 “ and employment of the said premises as aforesaid are necessary
 “ to enable them to earn the profits upon which they pay income
 “ tax, and without the said premises and their use as aforesaid
 “ the appellants’ profits, if there were any at all, would be less
 “ in amount.”

The main question in *Usher’s* case ²⁵ was whether the brewers were entitled to any of these deductions at all. Lord Loreburn L.C. said ²⁶: “ Accordingly the main question for decision is “ this. When the owners of a brewery business, who are also “ landlords of tied houses which sell their commodities by retail, “ come to be assessed for income tax under Sch. D, can they, “ in estimating the balance of profits and gains on the brewery “ business, bring into account expenses which they have properly “ though voluntarily incurred in supporting their tenants so as “ to enable them to sell the goods supplied by the brewery “ company?” This question was determined in favour of the brewers. It then became necessary to decide whether each of the separate claims was valid and there was much argument about the first claim for the cost of repairs. This claim was held to be valid but I need not consider the reason why, because the reasoning regarding this claim is not relevant in the present case.

What we are concerned with in this case is the second claim and the reasons for which it was allowed. That claim covered both freehold and leasehold properties. The form in which the claim in respect of leasehold properties was made and allowed is helpful to the appellant in this case, because it purports to be based on the rents actually paid by the brewers whereas the claim in respect of freehold properties purports to be based on the amount of the Sch. A assessments. These are in their nature very different things: the rents paid were sums actually expended, whereas the Sch. A assessments did not represent anything paid out by the brewers. But this difference in character received little attention either in the arguments as reported or in the speeches in this House. It may well be that the reason for that was that it was assumed throughout that there was no difference in amount between the rents paid by the brewers, the Sch. A assessments, and what I have called the potential rents which

²⁵ [1915] A.C. 433.²⁶ Ibid. 443.

the brewers could have got by letting without any tie. I think that the real problem in this case is to discover whether the claims in respect of freehold and leasehold properties were allowed for the same reasons or not.

I do not think that it is very difficult to discover the grounds of the decision on the freehold part of the claim. Lord Loreburn L.C.²⁷ states this claim as "the difference between the rents actually received from the tied tenants and the proper annual value," and he then says: "On ordinary principles of commercial trading such loss arising from letting tied houses at reduced rents is obviously a sound commercial outlay. Therefore this item must be deducted." Lord Atkinson²⁸ referred to the decision in *Russell v. Town & County Bank Ltd.*²⁹ "that a trader who owns and occupies premises in which he carries on his trade is entitled to deduct from his receipts the full annual value of those premises assessed under Sch. A," and then said: "This is obviously right and just, because if he abstains from letting his premises and devotes them to the purposes of his trade he must be taken to have dedicated to that trade a sum equivalent to the annual sum which he might have obtained in the shape of rent if he had let them to an untied tenant." Then he considered whether the fact that the brewer was not in occupation of the tied house made any difference and said³⁰: "I do not think it can possibly make any real difference in principle in respect to this right to deduct, if the salesman put into the tied house, to live in it (as he must do to obtain a publican's licence), happens to be a tenant and not a manager, though the brewer no doubt occupies the house in the one case, because the occupation of the manager is his occupation, and not in the other; but the balance of the profits and gains of the brewer's trade would, according to the methods of practical business men, be ascertained in the same way in both cases, i.e., by deducting from the receipts what it costs to earn them. Part of the cost to the brewer is, in the manager's case, his salary, and possibly a discount on profits. In the case of the tenant it is the difference between the annual value of his, the brewer's, freehold house and the rent he receives for it, and in his leasehold house the difference between the rent he receives for it and the rent he pays for it, if that be equal to the full annual value under Sch. A. For the

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²⁷ [1915] A.C. 433, 446.²⁸ *Ibid.* 452.²⁹ 13 App.Cas. 418.³⁰ [1915] A.C. 433, 457.

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1951 “ cases are in principle indistinguishable.”

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Lord Parker of Waddington also based his opinion on the decision in *Russell v. Town & County Bank Ltd.*³¹ He said³²: “ Thirdly, *Russell v. Town & County Bank Ltd.*³¹ decides, if not “ expressly at any rate by implication, that the first part of the “ rule which prohibits deductions for disbursements and expenses, “ not being money wholly and exclusively expended for the pur- “ poses of the trade, does not preclude a deduction for the annual “ value of premises used wholly for the purposes of the trade, “ though such annual value of premises is not money expended “ in the ordinary sense of the word.” I will not quote from Lord Sumner’s speech because I think that he goes too far in the passage which has so often been quoted. But at least he makes it clear³³ that in his opinion “ rent forgone ” is the basis of the deduction. Lord Parmoor’s speech is more difficult to interpret but I think that he regarded the annual value of the freehold properties as an expense.

As I read the speeches this House decided unanimously that, as regards freehold properties, the difference between annual value and the tied rent was to be regarded as “ money wholly “ and exclusively laid out or expended for the purposes of the “ trade ” within the meaning of what was then rule 1 and is now rule 3 (a) of Cases I and II of Sch. D, and was therefore a good deduction. It was argued for the appellant that this decision must be regarded as having been in some way superseded by reason of changes in other rules of Cases I and II since 1914: but the only rule which has been materially altered is that which was rule 2 and is now rule 5. That rule has never had any application except to a trader who was occupying the premises the annual value of which is to be deducted. So it could not be the basis of the deduction allowed in *Usher’s case*,³⁴ and in fact no one in that case ever suggested that it was the basis of the deduction allowed. I am therefore unable to understand how a change in that rule can have any effect on the decision in *Usher’s case*.³⁴ I confess I do not find it easy to understand how the conclusion was reached that the difference between the annual value and the amount of the tied rent could be regarded as money expended; but I have no doubt that that

³¹ 13 App.Cas. 418.

³² [1915] A.C. 433, 460.

³³ Ibid. 469.

³⁴ [1915] A.C. 433.

was the decision of the House and I cannot see that any later statutory enactment has in any way invalidated that decision.

It remains to determine what was meant in *Usher's* case³⁴ by annual value. Was it annual value for the purpose of Sch. A assessment or was it the potential rent? In 1914 there was seldom any material difference between the two but now the difference is frequently material. Probably the point was not much considered in *Usher's* case,³⁴ and therefore there appears to be some difference of opinion. Lord Parker seems the only one of the noble and learned Lords who was definitely of opinion that the Sch. A assessment should be taken. I cannot discover which view Lord Parmoor held, but I think that Lord Loreburn L.C., Lord Atkinson and Lord Sumner all held that potential rent was the true basis of the deduction. Lord Sumner was clearly of that opinion, and I think that Lord Loreburn's opinion is almost equally clear, because he refers³⁵ to the "loss arising "from letting tied houses at reduced rents": that must, I think, mean the difference between those rents and something which the brewer could have received if he had acted differently; he could have received the potential rent but he could never have received the amount of the Sch. A assessment as such. Lord Atkinson, in the passage I first quoted from his speech, seems to regard the two as interchangeable, but in the end he states quite clearly that the trader must be regarded as having dedicated to his trade what he could have obtained as rent from an untied tenant. If their Lordships had intended that the deduction should be based on something other than the true annual value and that the Sch. A assessment should be taken instead, I would have expected to find some reference to some reason for this. To base a deduction on the difference between what was received and what might have been received is intelligible, once it is established that there is to be a deduction; but to base it on the difference between what was received and a figure which may have little relation to any present value would seem to require some justification, and I can find none. Accordingly, but not without some hesitation, I have come to be of opinion that it must be held that this House decided, at least by a majority, that the deduction permissible in the case of freehold properties was the difference between what the brewer might have got as rent from an untied tenant and what he in fact got from his tied tenant.

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³⁴ [1915] A.C. 433.³⁵ Ibid. 446.

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Was the decision of this House that the same deduction should be allowed in the case of leasehold properties or was the basis of the deduction in that case to be something different? At first sight it would seem that there was some difference, because there are constant references to annual value in the case of freehold properties and rent in the case of leasehold properties, but these references seem merely to echo the wording of the brewers' claim, and in order to find the real ground of decision one has to look at the reasoning rather than at the words which were used.

My Lords, it is very unsatisfactory to have to grope for a decision in this way, but the need to do so arises from the fact that this House has debarred itself from ever reconsidering any of its own decisions. It matters not how difficult it is to find the ratio decidendi of a previous case, that ratio must be found. And it matters not how difficult it is to reconcile that ratio when found with statutory provisions or general principles: that ratio must be applied to any later case which is not reasonably distinguishable. It is not even suggested that this case can be distinguished from *Usher's* case.³⁶ Subsequent events have given importance to differences which, when *Usher's* case³⁶ was decided in 1914, were of little moment, and it is not surprising that these matters were not then elaborated. But there must have been a decision. There are three possible bases for the deduction which this House undoubtedly allowed in the case of leasehold properties: the basis must have been deduction of rents received from either rents paid, or Sch. A assessments (gross or net), or potential rents which the brewer might have got from untied tenants. It is true that in *Usher's* case,³⁶ whichever basis was held valid, the practical result would have been the same, because in that case rents paid, Sch. A assessments, and potential rents were all assumed to be equivalent in amount. But no deduction at all could have been allowed until a valid basis had been found for it, and the House must have chosen between the three possibilities, unless indeed it had held that all three were admissible—a result which would be fatal to the appellant's case.

It does not appear from the reported arguments in this House that either side stressed any difference between the cases of freehold and leasehold properties. For the Crown it was contended that no part of the deduction claimed was allowable. For the brewers it was contended that the whole deduction was permissible under rule 1 of Cases I and II of Sch. D, and very little

³⁶ [1915] A.C. 433.

distinction was drawn between the cases in the speeches in this House. But I think that the reasoning of at least Lord Loreburn, Lord Atkinson and Lord Sumner shows that they must have taken annual value as the basis of the deduction in this case as they did in the case of freehold properties. Lord Loreburn said, dealing with both parts of the second claim³⁷: "In consideration of this 'tie' the tenants occupy at rents less than the annual value and less than the rents which the brewery company itself has to pay for the houses, and the sum claimed to be deducted must be taken to represent in each case the difference between the rents actually received from the tied tenants and the proper annual value. For no argument was offered to show that the rent paid by the brewery company is other than the proper annual value." I think that it is clear that, if the "proper annual value" had differed from the rent paid by the brewer, Lord Loreburn would have held that the proper basis for the deduction was the annual value. If he had had to deal with the facts of the present case on the footing that the rent paid by the respondents to their subsidiary company greatly exceeds the proper annual value, I feel sure that he would not have allowed the full rent paid to be taken into account. And I think that it is equally clear that Lord Atkinson would not have accepted a rent which differed from the annual value; he said, dealing with the costs to the brewer which had to be brought into account³⁸: "It is the difference between the annual value of his, the brewer's, freehold house and the rent he receives for it, and in his leasehold house the difference between the rent he receives for it and the rent he pays for it, if that be equal to the full annual value under Sch. A." I have already noted that Lord Atkinson seems to regard annual value under Sch. A and potential rent as the same thing, and stated why I think that he and Lord Loreburn support potential rent rather than Sch. A value. Lord Parker refers to the rent paid by the brewers and makes no reference to annual value in the case of leasehold property. Lord Sumner³⁹ refers to "rent forgone" by the brewers letting houses which they hire and then re-let at a loss; he does not refer to annual value or potential rent, but this must I think be what he means, because one can only forgo rent if one could have obtained that rent by acting otherwise. Lord Parmoor's view is

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³⁷ [1915] A.C. 433, 446.³⁹ Ibid. 469.³⁸ Ibid. 457.

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It is convenient at this point to notice the facts in the second appeal in which Webbs (Aberbeeg) Ld. are respondents. For all but one of the public houses with which that case is concerned the rents paid by the respondents are less than the Sch. A values and also presumably less than the potential rents which they could get from untied tenants. An extreme instance is the Globe Hotel, Abertillery, which the respondents hold on a lease for 870 years at a rent of one shilling, but to acquire this lease they paid £14,900. The tied rent is £60 and the gross Sch. A valuation £66. If the appellant's contention is right, that *Usher's* case⁴⁰ decided that the only deduction allowable in respect of leasehold premises was the amount by which the tied rent fell short of the rent paid by the brewer, then the brewer could never have got any deduction in respect of this house, however small the tied rent might have been. I find it impossible to reconcile such an unreasonable result with the reasoning in *Usher's* case,⁴⁰ and I doubt whether even Lord Parker would have supported it. If the Globe Hotel had been freehold instead of being held on an 870-year lease, the deduction would undoubtedly have been based on the annual value (potential rent or Sch. A valuation). In *Collyer v. Hoare & Co. Ld.* (No. 2)⁴¹ the Crown sought to avoid such a disparity by conceding that the deduction should be based on annual value where that exceeded the rent paid by the brewers, but that concession is not made in this case and it is quite illogical. I can find no ground in *Usher's* case⁴² or elsewhere for the view that the brewer can claim the annual value as the basis of the deduction when the rent which he pays is small but cannot claim that basis when the rent is large. So I am fortified in my opinion that *Usher's* case⁴² decided that he can claim the annual value as the basis in every case.

I must now notice certain expressions of opinion which appear to be adverse to the conclusion at which I have arrived. In *Lowry v. Consolidated African Selection Trust Ld.*⁴³ *Usher's* case⁴² was distinguished. The company had issued shares to its employees at less than market value and it was held that they were not entitled to deduct as an expense the additional sum which they could have obtained if they had sought the market

⁴⁰ [1915] A.C. 433.

⁴¹ [1938] 1 K.B. 235.

⁴² [1915] A.C. 433.

⁴³ [1940] A.C. 648.

price. To reach this result it was not necessary to determine precisely the nature of the deduction allowed in *Usher's* case⁴⁴ in respect of leasehold premises, but Lord Russell of Killowen dealt with that matter at some length. He said⁴⁵: "The matters there in debate, which are relevant to the present case, were two, namely (1) the freehold tied houses which the brewery let to tenants at rents lower than the Sch. A assessment, and (2) the leasehold tied houses which the brewery sublet to tenants at rents lower than the rents paid by the brewery to the freeholders. It was held that the brewery could, in ascertaining its profits, charge as an expense (in the first case) the difference between the rents paid by the tenants and the Sch. A assessment, and (in the second case) the difference between the rents paid by the tenants and the rents paid by the brewery. In other words, the receipts side of the account included the smaller sums of rent received by the brewery while the expenditure side included the larger sums representing (a) the annual value of the freeholds, and (b) the rents paid by the brewery. Three things may here be noted, namely (1) so far as concerns the leaseholds the position seems to present no abnormal features: it is a plain case of entering actual income and actual outgoings; (2) the great difficulty arose as to the freeholds in regard to which no actual disbursement or expense was made or incurred by the brewery, which could be described as money laid out or expended for the purposes of the trade; and (3) it was never suggested that anything beyond the Sch. A assessment (e.g., the amount of a potential rack rent) could be charged as an expense. It is in regard to the decision concerning the annual value of the freeholds that I propose to consider the case."

None of the other noble and learned Lords explained *Usher's* case⁴⁶ in this way. Lord Caldecote L.C. merely said⁴⁷: "In the case of the leaseholds, the rent paid, which as Lord Loreburn pointed out was not other than the proper annual value, was an obvious item of expense." Lord Maugham did not deal separately with this point. Lord Wright, who dissented, said, apparently with reference to both freehold and leasehold properties⁴⁸: "The brewers were letting their houses at an under-value in order to promote their trade. They were held entitled to a deduction of the true value, subject to allowance for the

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⁴⁴ [1915] A.C. 433.⁴⁵ [1940] A.C. 648, 672.⁴⁶ [1915] A.C. 433.⁴⁷ [1940] A.C. 648, 655-6.⁴⁸ *Ibid.* 682.

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"rent which they actually received." Lord Romer, who also dissented, came nearest to agreeing with Lord Russell on this point. He said ⁴⁹: "Both the annual values in the case of the freeholds and the rents paid in the case of the leaseholds were treated as forming part of the cost of the brewery business and for precisely the same reason, namely, that both the rents paid for the leasehold properties and the rents that would have been received for the freeholds had they been let, instead of being used for the business, formed part of the costs incurred in earning the receipts of the business, and that the deduction of them was not prohibited by the Act."

If it were possible to enter the rents received by the brewery in the receipts side of the account, as Lord Russell suggests, then *Usher's* case ⁵⁰ might well be regarded as "a plain case of entering actual income and actual outgoings." But Lord Russell must, I think, have omitted to notice that that is just what *Fry v. Salisbury House Estate Ltd.* ⁵¹ prevents. It was rightly admitted for the appellant in this case that that is so. So if this were the right way to look at the case and the rent paid should be entered as an actual outgoing, nothing ought to be entered on the other side of the account and the brewer would get a much larger deduction than *Usher's* case ⁵⁰ allowed him. The Crown seek to get round this difficulty by deducting the rent received from the rent paid before the latter is entered in the account and only entering the difference. It was argued that the *Salisbury House* case ⁵¹ does not prevent this procedure. I think that the answer to that argument is to be found in *Hoare & Co. Ltd. v. Collyer*. ⁵² In that case the brewers were entitled to deductions in respect of some public houses, but they also held others where payments by the tied tenants exceeded the annual values. The Crown sought to diminish the deductions by setting off against them the excess rents received from tenants who paid more than the annual value, but it was held that this was not permissible. Lord Warrington of Clyffe said ⁵³: "It seems to me to be now settled by the authority of *Fry v. Salisbury House Estate Ltd.* ⁵¹ that the profits and gains arising from the ownership of lands, whether used for the purposes of a trade or not, are determined exclusively by reference to annual value, and not by the result of an account of receipts on the one hand and expenses on the other, and that accordingly the rents

⁴⁹ [1940] A.C. 648, 698.⁵² [1932] A.C. 407.⁵⁰ [1915] A.C. 433.⁵³ *Ibid.* 414.⁵¹ [1930] A.C. 432.

“received cannot be included in an account under Sch. D of the profits and gains of the trade for the purposes of which the lands are used.” And then later he said ⁵⁴: “Items of receipt and expenditure respectively cannot in my opinion be set off one against the other unless they are both properly included in one account.” Lord Warrington was not alone in this view. Lord Atkin said ⁵⁵: “It makes no difference whether you are seeking to establish a balance of profit or destroy an item of loss.” Lord Tomlin said ⁵⁶: “It does not seem to me to be any the less a bringing into charge because the thing, or the part of the thing, brought in is brought in for the purpose of wiping out deficits arising in cases where the rents do not equal the Sch. A valuations.” And Lord Macmillan said ⁵⁷ “. . . to use part of the rents in diminution of a deduction from the profits is just to that extent to add the rents to the profits.” It is true that the point in *Hoare's* case ⁵⁸ was not precisely the same as that in this case, but I think that the ground of decision in *Hoare's* case ⁵⁸ was general. If you cannot bring a rent in on one side of the account you cannot use it to diminish an entry on the other side.

If this answer to the appellant's argument is not sufficient I think that it can also be met in another way. The contention is that a part of the rent paid, but only a part of it, is to be entered in the account as a deduction. That must mean that the part which is to enter the account was money wholly expended for the purposes of the trade but that the rest was not. The part which is not to enter the account was certainly expended, and it can only be excluded from the account if it was not wholly expended for the purposes of the trade. For what purpose then was it expended? The brewer has to pay rent under a long lease and the tied rent which he receives may vary from time to time. I am at a loss to understand how rent which would otherwise be held to have been wholly expended for the purposes of the brewer's trade can cease in part to have been expended for those purposes because the brewer has received money from a sub-tenant. So, if the decision in *Usher's* case ⁵⁹ had been that the rent paid is money expended within the meaning of rule 3 (a) and that the rent received must be deducted from it, far from being a plain case it would be highly anomalous. I think that whichever way *Usher's* case ⁵⁹ is interpreted the decision is

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⁵⁴ [1932] A.C. 407, 415.⁵⁵ Ibid. 417.⁵⁶ Ibid. 420.⁵⁷ Ibid. 421.⁵⁸ [1932] A.C. 407.⁵⁹ [1915] A.C. 433.

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anomalous, and, if it is relevant to have regard to such considerations, I prefer the interpretation which involves the same anomaly throughout rather than that which involves two separate anomalies, one for the freehold and another for the leasehold properties.

The respondents submitted a further argument based on section 125 of the Income Tax Act, 1918, but, as I am of opinion that they are entitled to succeed on other grounds, I do not find it necessary to consider this argument. I agree that these appeals should be dismissed.

LORD RADCLIFFE. My Lords, the decision of this House in *Usher's* case⁶⁰ has been often alluded to and sometimes explained. More than once it has been rather explained away than explained: for I think that it has come to be regarded as a special case, the principle of which it is difficult to discover and almost impossible to extend. But now, and perhaps for the first time, it is necessary for this House to decide exactly what that principle is.

There has never been room for doubt as to what *Usher's* case⁶⁰ decided. It is the basis of the decision that is the matter for debate. First, it decided something in favour of a brewing concern and not against the concern. It decided that that concern had a right to the claims that it put forward. In our courts a party gets what he asks for, if it is not more than that to which he is entitled: but he does not always ask for all that he is entitled to get. Secondly, it decided (and this was the real contest in that case) that the relation of a brewing concern to its tied houses was so special that it was entitled to charge against the receipts of its brewing business, when making up its taxable profits under Sch. D, sums expended by it, actually or notionally, in respect of those houses. And, lastly, it decided that those sums included⁶¹ the "difference between rents of leasehold "houses or Sch. A assessment of freehold houses on the one "hand and rents received from tied tenants on the other."

Now, the first question is, what is the basis of that decision with regard to leasehold houses? The argument has thrown up a variety of possible answers. What looks like the simplest is to say that it is a mere question of entering on one side of the account the sum disbursed to pay the head rent and on the other side the sum received from the tied tenant. That gives the

⁶⁰ [1915] A.C. 433.⁶¹ *Ibid.* 434.

difference. And so it would, if you make the very large assumption that in each case the head rent is larger than the tied rent. If it is not, the principle goes astray, for the brewer, who may have paid a large premium to acquire his leasehold house at a low rent, forgoes annual value in his tied rent just as much if he is himself paying a low rent as if he is paying a rack rent. But this explanation, if it were admissible, would support the Revenue's case in this appeal, for plainly the entry of rent paid under long leases would no longer be a permissible charge to profits under Sch. D. now that section 17 of the Finance Act, 1940, has been enacted.

In my opinion we are bound to reject this explanation of *Usher's* case.⁶² It can invoke two very great names at least in support of it. I cannot read what Lord Parker says⁶³ without concluding that he did treat the claim in respect of leasehold houses as being essentially one to deduct rent paid on terms of giving credit for rent received; nor do I doubt that in *Lowry's* case⁶⁴ Lord Russell of Killowen accounted for *Usher's* case⁶⁵ in the same way. Nor does that exhaust the list of authorities that might be prayed in aid of this view. But it seems to me quite impossible to reconcile such a reading with the decision of this House in *Fry v. Salisbury House Estate Ltd.*⁶⁶ For if, as that case decides, the actual rents received from the tied tenants are not taxable receipts for the purpose of assessing the brewing concern's profits under Sch. D, how can they be treated as entered upon one side of the account for the purpose of "mitigating" the charge in respect of the actual amounts paid by way of head rent? Indeed, if this were the true basis of *Usher's* case,⁶⁷ the full amounts paid by way of head rent would have been admissible as deductions but no counter entry could have been made in respect of receipts. And no one appears ever to have suggested that this is the result of *Usher's* case⁶⁷ and *Fry v. Salisbury House Estate Ltd.*⁶⁸ when taken together. The two decisions were, in fact, much canvassed before this House in *Hoare & Co. Ltd. v. Collyer*,⁶⁹ and I think it fairly obvious from the speeches of the noble and learned Lords who took part in that decision that they were well aware that an interpretation would have to be placed upon the decision in *Usher's* case⁷⁰ that would

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⁶² [1915] A.C. 433.⁶³ Ibid. 462-3.⁶⁴ [1940] A.C. 648, 673.⁶⁵ [1915] A.C. 433.⁶⁶ [1930] A.C. 432.⁶⁷ [1915] A.C. 433.⁶⁸ [1930] A.C. 432.⁶⁹ [1932] A.C. 407.⁷⁰ [1915] A.C. 433.

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not bring it into conflict with the general principle embodied in the other and later decision. But, if so, an interpretation which is based merely on setting receipts against expenditure must be abandoned.

To reject this explanation of *Usher's* case⁷⁰ is, I think, to reject the real basis of the Revenue's appeal. But their argument as presented to your Lordships clung, no doubt wisely, to the indisputable fact that, in the case of leaseholds, *Usher's* case⁷⁰ had accepted the difference between rents paid and rents received as the measure of the brewer's permitted charge. At least, it was said, "rents paid" involves a claim based on the actual disbursement in respect of rent, and it is just those disbursements, if made under "long leases," which are no longer admissible deductions. But *Usher's* case⁷⁰ took as its measure a difference, not an actual disbursement. The distinction may mean much or little. If the test is not simply disbursement against receipt, the difference denotes either such part of the actual rent paid as exceeds the rent actually received or else some method of calculating a notional disbursement, which does not affect to express an actual disbursement at all. The former view would, I think, support the Revenue, for if the rent paid under a long lease cannot be charged against receipts in assessing profits, then the charge of even a part of it must similarly be prohibited. But if the latter view prevails then the principle of *Usher's* case⁷⁰ is untouched by the Finance Act, 1940.

My Lords, I have come to the conclusion that it is the latter view that must prevail. I cannot see any rational basis for the former. If the House had really meant to decide in *Usher's* case⁷⁰ that rent paid by a brewing concern in respect of its tied house was itself expenditure made wholly and exclusively for the purposes of the trade, it was very easy to say so. I do not think that any of their Lordships (with the possible exception of Lord Parker) did so decide or intended so to decide. Had they done so, then the right to treat the whole amount expended as a charge would have been established, whatever difficulties the *Fry v. Salisbury House Estate Ltd.*⁷¹ decision might have involved. But the point is that either the whole of the rent or none of it must be regarded as such a disbursement. If it is the purpose of such expenditure that is in question, I cannot think of any reason why one part of it should be treated as expended for the purposes of the trade and not another. Accordingly, to take the case of

⁷⁰ [1915] A.C. 433.⁷¹ [1930] A.C. 432.

any individual tied house, I can find no reason why so much of the rent paid by the owner as exceeds the rent received by him should be regarded as a disbursement for the purposes of the trade, if the whole of the rent is not.

As I see it, the House in *Usher's* case⁷² did not conceive itself to be dealing with an actual disbursement at all: nor did it intend to approach the solution from that point of view. The "difference" between rents paid and rents received represented a way of calculating a "loss" which, to those who took part in the decision, was itself a proper charge in the trader's accounts. It was this "loss," not any sum actually paid, that was the expenditure or disbursement. Indeed, once the assessment of the trade profits is approached on this basis it necessarily follows that a trader cannot both charge the "loss" and the rent actually expended; and a decision that the allowable item of expenditure in these tied house cases is the "loss" excludes by inference the correctness of charging the rent paid as itself an item of admissible expenditure. I think that the speeches of Lord Loreburn, Lord Atkinson and Lord Sumner are only consistent with the hypothesis that it was a notional expenditure equivalent to the "loss" that they proposed to allow to the trader: and it is only an explanation on these lines that covers the fact that none of those who took part in the decision (with the possible exception of Lord Parker) appeared to think that any different principle governed the case of the leaseholds from that which governed the case of the freeholds. Yet in the case of the latter there was no question of any actual expenditure.

It is not easy to say exactly what the principle is that forms the basis of such a charge. It does not arise from any interpretation of rule 5 of the rules applicable to Cases I and II of Sch. D; for, whatever the real meaning of rule 5 (1), it applies only to land and buildings occupied for the purpose of the trade or profession, and none of their Lordships treated the tied houses in *Usher's* case⁷³ as being in the occupation of the brewer or thought that this particular rule could support his decision. On the contrary the charge is supported⁷⁴ "on ordinary principles" of commercial trading," as being "according to the methods" of practical business men," or as an illustration of the economic propositions that are set out in the well-known passage of Lord Sumner's speech. But the validity of these same propositions

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⁷² [1915] A.C. 433.⁷³ [1915] A.C. 433.⁷⁴ *Ibid.* 446, 457.

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as a guide to the law of income tax has been virtually disowned by your Lordships' House in the later case of *Lowry v. Consolidated African Selection Trust Ltd.*⁷⁵; and in *Hoare & Co. Ltd. v. Collyer*⁷⁶ there was uncontradicted evidence from a chartered accountant called by the Revenue⁷⁷ that in computing commercial profits no deduction could properly be made "in respect of the "annual value or rent forgone or sacrificed" in respect of the brewer's freehold properties. I am bound to say that I should myself have so supposed, for I do not think that there is any general practice or principle by which a trader charges his profits with a sum in respect of the use either of his assets or of his capital. The consumption of his capital raises different considerations. But, even if the conception upon which the *Usher* decision⁷⁸ rests is ambiguous in origin and exceptional in practice, I think that it does both involve and establish the proposition that a trader who owns such assets as tied houses and uses them as tied houses are used may charge his trading profits with a sum equivalent to the part of the annual value of those assets that he has "forgone" by such use.

Now if that is the principle, as I think that analysis of the speeches in *Usher*⁷⁸ shows that it is, the actual head rent paid in respect of leaseholds cannot be a real factor in determining what is forgone. It may be an adequate practical indication of the "loss," as it was treated as being in *Usher*.⁷⁸ But the rent may be much less than the annual value, or more or less equivalent to it, or even much greater than it, as it is here in the case of the main Tamplin head-lease. Nor, if the rent paid were the conclusive test, would there be any purpose served by the insistence of both Lord Loreburn⁷⁹ and Lord Atkinson⁸⁰ that the brewer's claim to deduct the difference between rents paid and rents received is justified only if the rents paid are equal to the "proper annual value" or "the full annual value under Sch. A." Such a qualification necessarily implies that it is the "full" or "proper" annual value that is the true factor in the deduction and not the actual rent.

With this much said, I will try to summarize what I believe to be involved in the *Usher* decision.⁸¹ It decided that a brewer's relation to his tied houses was a special one, since, though not occupied by him, they are used by him for the purpose of his

⁷⁵ [1940] A.C. 648.

⁷⁶ [1932] A.C. 407.

⁷⁷ [1931] 1 K.B. 123, 126.

⁷⁸ [1915] A.C. 433.

⁷⁹ Ibid. 446.

⁸⁰ Ibid. 457.

⁸¹ [1915] A.C. 433.

trade. The house is the "market-place" for his beer, to borrow Lord Atkinson's phrase.⁸² It decided that the brewer's trade profit in such circumstances ought to bear a charge equivalent to the amount of annual value "forgone" in respect of each house so utilized: the whole annual value, if he got no return from the house (though that, I am afraid, rather begs the question) or the difference between the annual value and the rent received in respect of the house, so far as he took rent. His right to charge this sum or this difference arises, it was held, from the ordinary principles of commercial accounting and, not being prohibited by anything to be found in the income-tax statutes, ought to be allowed. Whether this principle is an application or an extension of what was decided in *Russell v. Town & County Bank Ltd.*⁸³; whether it is in any way founded upon what is said or not said in rules 1 to 5 of the Rules applicable to Cases I and II of Sch. D; and whether the structure of the Income Tax Act, with its different schedules, may not have contributed, though without recognition, to the discovery of the principle: all these questions are, "though puzzling, not beyond all conjecture." But the conjectures are, I think, of no ultimate importance when once the principle has been laid down. Finally, the principle is the same whether the brewer's tied house is freehold or leasehold.

For these reasons I think that these appeals must fail, since it is not suggested that if the *Usher* decision⁸⁴ proceeds upon the basis that I have stated the brewer's position has been altered by the Finance Act, 1940.

But, though I agree that these appeals must fail, I do not agree with the respondents' claim that the "difference" ought to be ascertained by taking as a factor "the rents at which these houses could have been severally let free from the restriction of the tie." I think that that is to introduce a novel and unwanted idea into the *Usher*⁸⁴ computation. Moreover it seems to me that, in the case of freeholds, this House did explicitly decide that the correct measure was the net Sch. A assessment and nothing else. Paragraph B of the Supplemental Statement in the *Usher* case⁸⁵ had stated that in the case of freeholds the net Sch. A assessment had been taken as the basis of the figures. If the gross assessment had been taken, it would, of course, have given the brewer a larger disbursement to charge to his profits. If, on the other hand, the true standard was the rent of the house

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⁸² [1915] A.C. 433, 455.⁸⁴ [1915] A.C. 433.⁸³ 13 App.Cas. 418.⁸⁵ Ibid. 436.

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as let without the tie, no one could say whether the result would have favoured the brewer or not, for among other things each letting would have had to be considered separately, and the details of its various other terms ascertained. In this House Lord Parker alone went into the point, and he expressed a view in favour of taking the gross, not the net, Sch. A assessments. None of the other Lords, who could hardly have been unaware of what he proposed to say, said anything in support of this view. But on that state of facts how can we avoid the conclusion that the question was considered by the House and that its decision upheld the net Sch. A assessment as the correct standard in the case of freeholds?

I do not find that, except for Lord Parker's preference for the gross assessment, a standard which still adheres to Sch. A, any member of the House said anything to suggest that, either in the case of freeholds or of leaseholds, the right thing to do was to take each house each year, ascertain the terms of its letting, and then compute what its rent would have been in that year had it been let with those terms but without the tie. They speak⁸⁶ of "annual value," "proper annual value" or "full annual value" under Sch. A," and two of them certainly base themselves on *Russell's* case,⁸⁷ which turned on "annual value" and nothing else. But, whether Sch. A is explicitly referred to or not, "annual value" is itself the familiar phrase that we all know to be used in the Income Tax Act to describe the basis of the Sch. A assessment; and it denotes, where lands are not let at rack rent, the "rack rent at which they are worth to be let by the year." I cannot think that it is an appropriate phrase to describe a hypothetical computation of what rent could have been obtained under an actual letting if the tie had been removed.

I think, for these reasons, that the question is concluded by previous decision in the case of freeholds. And, since I think that the essence of the *Usher* decision⁸⁸ is that freeholds and leaseholds were treated as coming under the same principle, it seems to me that the same measure ought to be adopted in the case of leaseholds. I am sure that it would be much more convenient to do so. I appreciate that, if you are searching for a figure for rent forgone, the net Sch. A assessment may not give you as "scientific" a measure as the test proposed by the respondents. But it is a working measure; and, if we are seeking

⁸⁶ [1915] A.C. 433, 446, 457.⁸⁸ [1915] A.C. 493.⁸⁷ 13 App.Cas. 418.

to give effect to a principle of commercial accounting, I think that the trader would be far more likely to be content to work by a known figure, such as the Sch. A assessment, than by a theoretical computation of the rent likely to be received from his tied house, if it were untied.

This is not, so far as I can see, a matter of any important principle. I start from the same assumption as is, I believe, common to all your Lordships: that the notional disbursement allowed to the brewer is that amount of the annual value of his tied house which he fails to realize by virtue of taking the covenant for the tie. The annual value itself is necessarily a hypothetical figure in all such cases. The only point is, which is the best working hypothesis? You might proceed by employing a valuer to survey all your houses, each year, and compute for each a rack rent according to the values of that year. No doubt the Revenue must do the same, and no doubt, at some stage, the appropriate figures would be settled. Or you might proceed by employing a valuer to survey all your houses, each year, and compute for each a rent, according to the values of that year, representing what it would have let for under the existing lease, minus the covenant for the tie. Here again there must be controversy and possible counter-valuation and, no doubt, an ultimate conclusion. Or you might proceed by taking the existing Sch. A assessment which represents for income tax purposes the hypothetical rack rent of every property. If I think that the last form of procedure is the best, apart from being the one already finally decided upon, it is because I think that it is the one that every trader would prefer to accept, once the logical austerities of legal argument are allowed to be forgotten.

LORD TUCKER. My Lords, the decision in the case of *Usher's Wiltshire Brewery Ltd. v. Bruce*⁸⁹ must be considered in the light of the law as subsequently expounded by your Lordships' House in *Fry v. Salisbury House Estate Ltd.*⁹⁰ So considered it is, I think, impossible to accept the Crown's argument that the former case proceeded on the basis of allowing the brewer in the case of leasehold houses to deduct rent paid on giving credit for rent received. This would be contrary to *Fry v. Salisbury House Estate Ltd.*,⁹⁰ which decided that "rents received cannot be included in an account under Sch. D of the profits and gains of the trade for the purposes of which the lands [producing the

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⁸⁹ [1915] A.C. 433.⁹⁰ [1930] A.C. 432.

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"rents] are used." This was the explanation of that case given by Lord Warrington of Clyffe in *Hoare & Co. Ltd. v. Collyer*,⁹¹ and it shows that the interpretation of *Usher's* case⁹² given by Lord Russell of Killowen in *Lowry v. Consolidated African Selection Trust Ltd.*,⁹³ in the passage which has already been referred to, cannot be reconciled with *Fry v. Salisbury House Estate Ltd.*⁹⁴

This, I think, compels your Lordships to reject the contention of the Crown that under *Usher's* case⁹⁵ the respondents would have been entitled in computing their profits under Case I of Sch. D to deduct the rents paid by them for tied houses less the rents received from the tied tenants, but that the rents paid by them being rents under long leases are no longer deductible by reason of the provisions of section 17 (1) of the Finance Act, 1940.

If *Usher's* case⁹⁵ never allowed the deduction of these rents, what did it decide? My Lords, I do not propose to set out again those passages from the speeches of Lords Loreburn, Atkinson and Sumner which have already been referred to. It is sufficient for me to say that in my opinion they show that at any rate the majority of your Lordships' House allowed the brewers' deduction in the case of both freeholds and leaseholds on the basis of rent "forgone," being the difference between rents received and the potential rents which could otherwise have been obtained from free tenants, viz., the full annual values of the houses. It was never suggested that the rents paid in the case of the leaseholds or the Sch. A assessments in the case of the freeholds did not represent the full annual values in each case, and I think the reasoning of the majority shows that they were so accepted. If their Lordships had been of opinion that the Sch. A assessment must always and for all purposes be accepted as representing the full annual value or potential rent, it is difficult to understand why they did not substitute the Sch. A assessments for the rents paid in the case of the leaseholds. The truth is, I think, that in each case the figures put forward were accepted, but they were accepted as reflecting the full annual values, and I can find nothing in the decision to indicate that in either case it is not open to either side to call evidence to show what are the potential rents obtainable from "free" tenants for the purpose of quantifying the rent "forgone." For these reasons, although it will no doubt often be found convenient in practice for the parties to agree to accept the Sch. A assessments as representing the

⁹¹ [1932] A.C. 407, 414.⁹² [1915] A.C. 433.⁹³ [1940] A.C. 648, 672.⁹⁴ [1930] A.C. 432.⁹⁵ [1915] A.C. 433.

potential rents, I think the respondents are right in their contention that the rents "forgone" should be ascertained by deducting the rents received from the rents at which the tied houses could have been severally let free from the restriction of the tie.

I would dismiss the Crown's appeal in each case.

LORD MORTON OF HENRYTON. My Lords, my noble and learned friend Lord Asquith of Bishopstone, who is unable to be present today, has asked me to say that he agrees with the opinion which I have already delivered.

Appeals dismissed.

Solicitors: *Solicitor, Inland Revenue; Godden, Holme & Co.*

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BROMLEY AND OTHERS APPELLANTS;

Oct. 9, 10;
Nov. 29.

AND

TRYON AND OTHERS RESPONDENTS.

Applied. In re
GAPB, DHCD.
[1952] 1 Ch. 743

Will—Settlement—Shifting clause—Whether void for uncertainty.

A shifting clause in a will was expressed to operate should any of the issue of B become entitled to a specified settled estate "or the "bulk thereof." The estate might be altered substantially in size, character and value before the opening of any particular succession and might be composite of land and money.

Held, (1) that in the reference to "the bulk" value and not area or size was intended; (2) that the expression meant anything over half, and (3) that accordingly the clause was not void for uncertainty.

Decision of the Court of Appeal (sub nom. *In re Wilson's Will Trusts, Tryon v. Bromley-Wilson*) [1950] W.N. 507 affirmed.

APPEAL from the Court of Appeal (Evershed M.R., Asquith and Jenkins L.JJ.).

* *Present*: LORD SIMONDS L.C., VISCOUNT JOWITT, LORD NORMAND, LORD MORTON OF HENRYTON and LORD TUCKER.

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This was an appeal from an order of the Court of Appeal dated October 20, 1950, discharging an order dated May 5, 1950, of Harman J., so far as it declared that on the true construction of the will of Gertrude Sophie Wilson, the testatrix, the limitations therein in favour of the appellant, Sir Arthur Bromley, and his issue in the Dallam Tower Estate had not, up to the date of the order, been determined under any of the provisions of the will.

The question at issue in this appeal was whether or not the limitations of the Dallam Tower Estate in the will in favour of Sir Arthur Bromley and his issue had been determined under the provisions of a shifting clause. This involved the following questions: (1) Whether the clause in question was valid and effective or was void for uncertainty. (2) If it was valid, whether Sir Arthur Bromley ever became entitled to the possession or receipt of the rents and profits of the Stoke Hall Estate, "or the " bulk thereof," within the meaning of the clause. (3) In any case whether the clause could have any operation until Sir Arthur Bromley or one of his issue became entitled in possession to the Dallam Tower Estate.

When the testatrix died in 1892 Sir Maurice Bromley-Wilson (the elder brother of Sir Arthur Bromley) became first tenant for life of the Dallam Tower Estate under her will. Subsequently the trustees of the estate, for the purposes of the Settled Land Act, 1925, became Sir Arthur Bromley, Charles Edward Tryon and Harry Bordley Greenwood. In 1950, for reasons connected with the proper administration of the estate, it became urgently necessary to determine who, in the event of the death of Sir Maurice Bromley-Wilson without issue, would become entitled to the estate. The choice lay between Sir Arthur Bromley and his issue, if the shifting clause had not operated, and the issue of Mrs. Esther Tryon, his sister, if it had operated.

A summons having been taken out in the Chancery Division, Harman J. held that the limitation, in the will of the testatrix in favour of Sir Arthur Bromley and his issue in the Dallam Tower Estate had not determined since, on its true construction, the shifting clause could only operate when both estates vested or were about to vest in the same person. The Court of Appeal having reversed this decision, Sir Arthur Bromley and his children and grandchildren appealed to the House of Lords. The respondents were children and grandchildren of Mrs. Esther

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The facts are fully stated in the opinion of Lord Simonds L.C.

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Christie K.C. and *Maurice Berkeley* for the appellants.

E. Milner Holland K.C. and *Wilfrid Hunt* for the respondents.

The arguments sufficiently appear from the opinions.

Their Lordships took time for consideration.

November 29. LORD SIMONDS L.C. My Lords, this appeal raises a question as to the validity and effect of a clause, familiarly known to conveyancers as a "shifting clause," contained in the will dated July 4, 1890, of Gertrude Sophie Wilson, who died on January 23, 1892.

At the date of her will the testatrix was, subject to certain prior interests, including a life interest in her sister Emily, entitled in fee to an estate known as the Dallam Tower Estate situate in the counties of Westmorland and Lancaster. She was a connexion of one Sir Henry Bromley, 4th Baronet, who was at the date of her will tenant for life in possession of an estate known as the Stoke Hall Estate situate in the county of Nottingham, and she was minded, as plainly appears from her will, to settle the Dallam Tower Estate on his grandchildren and remoter issue in such a manner as to ensure that, if any such grandchild or his issue became entitled to the Stoke Hall Estate, then such grandchild or issue should lose whatever interest they took under her will in the Dallam Tower Estate. The substantial question is whether the clause in her will by which she has sought to carry out her intention is wanting in the precision which is a condition of the validity of a condition subsequent.

It will be convenient if, before I come to the relevant clause, I remind your Lordships of the few material facts including the devolution of title to the Stoke Hall Estate.

As I have already said, at the date of the will of the testatrix, Sir Henry Bromley, 4th Baronet, was tenant for life in possession of the Stoke Hall Estate and subject thereto the estate stood limited to his son, also named Henry, who afterwards became 5th Baronet, for life with remainder to Robert Bromley, the eldest son of the 5th Baronet, who later became the 6th Baronet, in tail male with remainders over. As will presently appear the estate was after the death of the testatrix resettled

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by the 5th Baronet (who had by the death of his father in 1895 succeeded to the title) as tenant for life in possession and his eldest son Robert as tenant in tail.

The pedigree of the Bromley family so far as is necessary for understanding the resettlement and the will of the testatrix and the questions which arise thereout is as follows:—

(i) The 5th Baronet had four sons and one daughter, all of whom were born in the lifetime of the testatrix.

(ii) His eldest son, Robert Bromley, the 6th Baronet, died on May 13, 1906, and had no male issue.

(iii) His second son, the respondent Sir Maurice Bromley-Wilson (hereinafter called “ Sir Maurice ”), the 7th and present Baronet, is 76 years of age. He has been married twice but has never had any issue; his present wife is over 70 years of age.

(iv) The third son is the appellant Sir Arthur Bromley (hereinafter called “ Admiral Bromley ”). He has had issue one son only, the appellant Rupert Howe Bromley, who is married and has had issue two children only, the infant appellants Rupert Charles Bromley and Maurice David Bromley. Admiral Bromley has had issue four daughters, of whom the eldest is the appellant Marion Victoria Bromley and the next daughter is the appellant Anne Lloyd, who is married and has issue. None of the children of Admiral Bromley was born in the lifetime of the testatrix.

(v) The fourth son of the 5th Baronet was Herbert Assheton Bromley, who died on April 24, 1915, a bachelor.

(vi) The only daughter of the 5th Baronet is Esther, who has been married once only, namely, to Charles Robert Tryon. She has had issue four sons of whom the eldest, Henry Robert Tryon, died in early infancy on August 21, 1913. Her second son is the respondent Charles Edward Tryon, and he has had issue two children only, both daughters, of whom the elder is the infant respondent Cicely Susan Esther Tryon and the younger died in early infancy.

(vii) The respondents John Tryon and Thomas Charles Tryon are the younger sons of Mrs. Tryon, and the respondent David John Tryon is the only son of the respondent John Tryon.

The Stoke Hall Estate was, as I have said, resettled after the death of the testatrix. This was effected by a resettlement dated February 26, 1897, following on the usual disentailing deed. The material limitations of the resettlement are as follows:—

(i) The 5th Baronet for his life.

(ii) Remainder to his said eldest son Robert for his life.

(iii) Remainder to the sons of such eldest son Robert successively according to seniority in tail male.

(iv) Remainder to Sir Maurice for his life and then to his sons successively according to seniority in tail male.

(v) Remainder to Admiral Bromley for his life and then to his sons successively according to seniority in tail male.

(vi) Remainder to Herbert Assheton Bromley for his life and then to his sons successively according to seniority in tail male.

(vii) Remainder to Rupert Fitzroy Bromley (a nephew of the 5th Baronet) for life and then to his sons successively according to seniority in tail male.

(viii) Remainder to the use that each of the persons (other than Rupert Fitzroy Bromley) to whom estates in tail male had been limited should take successively and in the same order estates in tail general.

(ix) Remainder to Mrs. Tryon for her life and then to her sons successively according to seniority in tail male and then to her daughters successively in tail general with other remainders over.

I must now return to the will of the testatrix, which I can state shortly. She thereby devised the freehold part of the Dallam Tower Estate on the following limitations:—

(i) To the use of her mother (who died in the year 1892) during her life.

(ii) To the use that her cousin Frances Carlton (who died in the year 1919) should receive for her life a yearly rent charge of £400.

(iii) Subject as aforesaid to the use of Sir Maurice (the second son of the 5th Baronet) during his life with remainder to his sons successively according to seniority in tail male with remainder to such sons successively according to seniority in tail general with remainder to his daughters successively according to seniority in tail general.

(iv) With remainder to the use of Admiral Bromley during his life with similar remainders to his sons and then to his daughters all successively in tail as aforesaid.

(v) With remainder to the use of Herbert Assheton Bromley during his life with similar remainders to his sons and then to his daughters all successively in tail as aforesaid, but these limitations failed as he died a bachelor.

(vi) With remainder to the use of the fifth and every other son of the 5th Baronet thereafter to be born successively in tail, but this limitation also failed as there was no such son.

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(vii) With remainder in the words following: "To the use of
" the first and every other daughter of the said Henry Bromley "
(referring to the 5th Baronet) " hereafter to be born successively
" according to seniority in tail general."

(viii) With remainders over to various members of the Hulton
family.

These limitations were followed by a proviso, which in certain events reduced estates in tail to estates for life, and then by the shifting clause, which I must state verbatim. It was in these terms: " Provided Always And I hereby Declare that if any son
" daughter or other issue of the said Henry Bromley within the
" scope of the limitations hereinbefore contained shall by any
" means whatsoever become actually entitled to the possession
" or the receipt of the rents and profits of the family estate of
" Sir Henry Bromley the father of the said Henry Bromley
" meaning thereby the Stoke Hall Estate near Newark in the
" County of Nottingham or the bulk thereof whether consisting
" of the same premises as that estate now consists of or in any
" manner altered in the way of addition substitution diminution
" or otherwise and so that this proviso shall not be rendered
" inoperative by reason of such estate or any part or parts thereof
" being subjected to any charges or incumbrances whatsoever
" then and so often as the same shall happen and thereupon
" every estate hereinbefore limited for life or in tail male or in
" tail to the son or daughter of the said Henry Bromley who or
" any of whose issue shall so become entitled and (as to any such
" son or daughter to whom an estate for life is hereinbefore
" limited) to the first and other sons and the first and other
" daughters successively of such son or daughter shall absolutely
" determine and the said premises hereinbefore devised shall go
" and remain to the uses upon the trusts and with and subject to
" the powers provisoes and declarations to upon with and subject
" to which the same premises would have stood limited and
" settled by virtue of this my will if such son or daughter had
" died and there had been a general failure of his or her issue.
" But nevertheless without prejudice as to any son or daughter
" of the said Henry Bromley to whom an estate for life is herein-
" before limited to any jointure yearly rentcharge or portions
" which may have been charged by such son or daughter under
" the respective powers for those purposes hereinafter contained
" before such son or daughter shall have become entitled in pos-
" session to the said Stoke Hall Estate as aforesaid and without

“ prejudice to any powers remedies or terms of years for securing
“ or raising any such jointure or portions respectively.”

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I need mention only one other provision of this will and I do so because counsel for the appellants suggested that it had some bearing on the question that your Lordships have to decide. I refer to the power thereby conferred on every person made tenant for life of the Dallam Tower Estate either before or after he should become entitled in possession to charge the estate with a jointure or portions, with a proviso that such jointure or portions should not be chargeable on the estate or be payable or carry interest unless and until such person or some issue of his or hers should, or if of full age would, have become entitled to the provision or receipt of the rents and profits of the estate.

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The testatrix also devised all her other freehold estates, subject to certain limitations which need not be stated, on the same limitations and subject to the same provisions as the Dallam Tower Estate, and she gave to her trustees all her copyhold and leasehold hereditaments on trusts corresponding with the same limitations and bequeathed certain chattels to devolve as heirlooms with the estate. The sister of the testatrix, who had a life interest in the estate, survived her by a few weeks only, and thereupon Sir Maurice became tenant for life in possession of the Dallam Tower Estate and of the properties and heirlooms settled therewith, and so he has remained to this day.

On May 13, 1906, upon the death without issue of the sixth Baronet, Sir Maurice was next entitled to a life estate in possession in the Stoke Hall Estate under the resettlement of 1897, but, apprehending that the result of his entering into possession of that estate would be to bring into operation the shifting clause in the will of the testatrix and so to forfeit his interest in the Dallam Tower Estate, on July 9, 1906, by a deed poll of that date, he disclaimed the life estate limited to him by the resettlement. The validity of this disclaimer was challenged by certain members of the family, but in proceedings commenced in the year 1911 in the Chancery Division it was declared by Neville J. that Sir Maurice was entitled to an estate for life in the Dallam Tower Estate. It has been urged on your Lordships that the effect of this judgment is that the question now raised as to the validity of the shifting clause is *res judicata*. I do not think it necessary to determine this question, but it is clear that it cannot be true of one at least of the present appellants who was neither a party, nor privy in estate to a party, to the proceedings in 1911.

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The disclaimer of Sir Maurice being thus effective, Admiral Bromley became and was from July 9, 1906, beneficially entitled under the resettlement of 1897 to a life estate in the Stoke Hall Estate or the bulk thereof within the meaning of the clause. It is important now to notice just what is the question that is to be determined, and I am for the time being ignoring a point upon which Harman J. decided in favour of the appellants. Counsel for the appellants sought at an early stage in his argument to raise this question: "Assume," he said, "that the shifting clause is not void for uncertainty, yet upon the facts Admiral Bromley did not come within it: he did not become actually entitled to the possession of the Stoke Hall Estate or the bulk thereof within the meaning of the clause." Your Lordships were, however, unanimously of opinion that this argument was not open to him. The unchallenged evidence on which the case proceeded before Harman J. and the Court of Appeal was that Admiral Bromley had since the death of the sixth Baronet in 1906 been in possession of the Stoke Hall Estate. I cite only the following passages. "He," said Harman J. (meaning Sir Maurice), "retained the Dallam Tower Estate which he had, and "Stoke Hall Estate went over to Admiral Sir Arthur Bromley "in 1906, and he has been in possession of it ever since." So also Jenkins L.J.¹: "The result, however, of that disclaimer was "that Sir Arthur did become actually entitled to possession or "receipt of the rents and profits of the Stoke Hall property, his "interest being accelerated by Sir Maurice's disclaimer and being "no doubt defeasible in the event of the birth of issue to Sir "Maurice. It was, no doubt, defeasible in the event of the birth "of issue to Sir Maurice, but nevertheless was unquestionably an "interest under which he became actually entitled to possession "or to receipt of the rents and profits." In these circumstances it was not open to the appellants to argue that Admiral Bromley's interest did not become subject to the operation of the shifting clause if it was a valid clause, though the actual or hypothetical facts of his case could be used to illustrate its uncertainty.

For reasons connected with the proper administration of the Dallam Tower Estate, in the year 1950 it became urgently necessary to determine who in the event of the death of Sir Maurice without issue would become beneficially entitled to that estate. The choice lay between Admiral Bromley and his issue if the shifting clause had not operated, and Mrs. Tryon and her issue

¹ [1950] 2 All E.R. 955, 958.

if it had, and this question, which was raised by an originating summons in the Chancery Division, has been decided by Harman J. in favour of Admiral Bromley, but by the Court of Appeal in favour of the issue of Mrs. Tryon who had herself disclaimed any interest.

My Lords, I have so far not mentioned the point on which Harman J. found it possible to decide this case in favour of the appellants. I can do so very shortly, for I am entirely satisfied with the way in which the Court of Appeal disposed of it. If I understand his judgment, the judge proceeded on the footing that on the reading of the will as a whole the testatrix intended to give and gave an election to the person who being in possession of either estate then became entitled to the other, and that, inasmuch as such an election became in certain events impossible on the literal meaning of the clause, it must be so read as only to operate at a moment when a person became entitled to both estates in possession. But I agree with Jenkins L.J. that this view proceeds on a false hypothesis. The language of the shifting clause is too clear to admit of it: there is not even an ambiguity. No other contention is possible than that, Admiral Bromley having become actually entitled to the possession or receipt of the rents and profits of the Stoke Hall Estate, thereupon every estate for life or in tail in the Dallam Tower Estate limited to him or his issue was absolutely determined. Nor can I find anything in the jointure and portions clause, to which I have referred, that in any way leads to a different conclusion.

I come then to the point which was not argued before Harman J. but was chiefly relied on in the Court of Appeal and in this House, viz.: that the clause is altogether void for uncertainty. It is a question which I must approach with this familiar principle in the foreground of my mind: that, where a vested estate is to be defeated by a condition on a contingency that is to happen afterwards, that condition must be such that the court can see from the beginning, precisely and distinctly, on the happening of what event it was that the preceding vested estate was to determine: see *Clavering v. Ellison*.²

The attack upon the language of the shifting clause was based mainly, if not entirely, on the four simple words "or the bulk thereof." These words, it was said, were so vague and uncertain that a beneficiary might not be able to know, nor a court to determine, whether that to which he succeeds for a life or other

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² (1859) 7 H.L.C. 707, 725.

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interest was the Stoke Hall Estate "or the bulk thereof." It was said, and I think rightly said, that it was immaterial that in many, perhaps the great majority of cases, there could be no doubt whether he had done so. It would be sufficient if from the vagueness of the very words the court cannot determine what is the condition on which defeasance takes effect. No better example of this can be found than in the latest case that came before this House, *Clayton v. Ramsden*,³ where the condition of defeasance was marriage to a person "not of Jewish parentage" and of the Jewish faith." It was irrelevant that of multitudes it might be predicated with certainty that they did or did not satisfy the condition: it was sufficient to hold both limbs of it void for uncertainty that the words themselves were incapable of precise definition. So also in *Sifton v. Sifton*,⁴ where the condition, which was regarded as a condition subsequent, was that payment was to be made to a daughter of the testator only so long as she should continue to reside in Canada, it was held that the term "reside" was too vague to enable the court and the parties concerned to see precisely and distinctly upon what events the payments to the daughter were to cease. The question then is whether the words that I have cited "or the bulk thereof" are of this nature.

My Lords, the shifting clause, as it appears in the will before us, is of respectable antiquity. It appears to have been the invention of the late Mr. Davidson, one of the great masters of the art of conveyancing, and to have been printed for the first time in the second edition of his *Precedents and Forms in Conveyancing*, Vol. IV, p. 516, which appeared (so far as this volume was concerned) in 1864. It was adopted by Key and Elphinstone in their second edition of *Precedents in Conveyancing*, Vol. II, p. 566, which appeared in 1883, and is to be found in the numerous subsequent editions up to 1920. Its validity has never, so far as counsel on either side have been able to find out, been questioned. In *In re Hinckes*,⁵ which came first before Astbury J. and then the Court of Appeal, this very clause was under consideration and, though its invalidity would have solved the difficulties of one at least of the parties, it did not occur to the distinguished counsel concerned to raise the question. In how many settlements the clause may have found a place, in how many instances estates may have been forfeited on the footing of its validity, no one

³ [1943] A.C. 320.⁴ [1938] A.C. 656.⁵ [1920] 2 Ch. 511; [1921] 1 Ch.

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can say. If indeed, on a consideration of the clause, I came to the clear conclusion that the words in question had no precise meaning, I should be bound to give effect to my opinion. A long course of conveyancing practice cannot, I think, even where titles may be founded on it, be given the same effect as a line of judicial authority. But at the lowest I should hesitate long before I concluded that words which had for nearly 100 years passed unchallenged by conveyancers, men often profoundly learned in the law of real property and apt to dwell on nice distinctions of language, were after all incapable of sufficiently precise definition.

What then am I to say of the words "the bulk thereof" in the clause and the context in which I find them? It is worth while, I think, to examine the context a little further. The words "the Stoke Hall Estate . . . or the bulk thereof" are followed by words which clearly show that the testatrix had in mind that the Stoke Hall Estate might be altered substantially in size, character and value before the opening of any particular succession; and, though it be altered by addition, substitution, diminution or otherwise, and be subjected to any charges or incumbrances whatsoever, it is still for the purpose of this clause "the Stoke Hall Estate." The question then is whether in the context the words "the bulk thereof" have no clear meaning. It was urged that the first and insoluble difficulty lay in this, that it was impossible to determine whether bulk referred to size or value; and in this connexion reference was made to the fact that in *In re Hinckes*⁶ Lord Sterndale M.R. and Younger L.J. refrained from expressing an opinion as to its meaning. I should regret it, my Lords, if, whenever a judge does not express an opinion upon a point which for the purpose of the case it is unnecessary for him to determine, it should be thought to follow that the point was incapable of determination. For myself I should have no doubt that in such a clause and context as this, where it is clear that the settled property may consist of land or capital moneys liable to be invested in land, the choice between size and value is easily made. Just as when I say, by no means colloquially but in formal language, that a man has left the bulk of his fortune or of his estate to X, I refer to value not to area or size, so when a testatrix refers to the bulk of a settled estate which may be composite of land and money, it is value not area or size that is intended.

Then it was said that even so the words are uncertain in content, for it is purely a question of degree what constitutes the

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“bulk.” I cannot accept this contention. I think that according to the ordinary use of language the bulk means the greater part, which may according to the subject-matter refer to area, number or value. And that I may not be thought guilty of a solution which is equally obscure, I will add that “greater part” means anything over one-half. I am of opinion that the words “the bulk thereof” are not subject to the same vice as were the words “of the Jewish faith” and “reside” in the cases that I have cited and as the expression “relation by blood” was thought to be by the Privy Council in *Sifton v. Sifton*,⁷ though Russell J. had determined otherwise in *In re Lanyon*.⁸

~ In deference to the argument of learned counsel who sought to illustrate the alleged obscurity of the relevant words by reference to the facts of the present case, I will only add this. It does not follow because the words of a defeasance clause are sufficiently clear to give the clause validity that there may not be cases in which its application is difficult, and I apprehend that, if there is a real doubt, the court will show the same favour to a vested estate in applying the clause as it does in construing it. But in the present case I do not find in the facts as proved, whether as illustrative of the difficulty of construction or of application, anything which would lead me to a conclusion favourable to the appellants.

I have said that the main argument on invalidity was directed to the words “or the bulk thereof.” Some reference was also made to the expressions “within the scope of the limitations hereinbefore contained” and “shall by any means whatsoever become actually entitled.” But I am wholly unable to see any sort of ambiguity in those words, though the result of them may be capricious.

This appeal should, in my opinion, be dismissed.

VISCOUNT JOWITT. My Lords, I concur.

LORD NORMAND. My Lords, I agree with the opinion of the Lord Chancellor and with that which my noble and learned friend Lord Morton of Henryton is about to deliver and which I have had the advantage of reading.

LORD MORTON OF HENRYTON. My Lords, this appeal must clearly be determined on the footing that in the year 1906 the

⁷ [1938] A.C. 656.

⁸ [1927] 2 Ch. 264.

first appellant, Admiral Bromley, became tenant for life in possession of the Stoke Hall Estate mentioned in the will of the testatrix Miss Wilson. The only affidavit filed in this case so states, and this fact was admitted before Harman J. and in the Court of Appeal.

Two questions remain for decision by your Lordships' House. First, whether the "shifting clause" in the testatrix's will is valid, or is void for uncertainty, and, secondly, if that clause is valid, whether on the true construction of the will it has already operated to exclude Admiral Bromley and his issue from ever succeeding to the Dallam Tower Estate.

The shifting clause has already been read, and I shall not read it again. The attack upon its validity is based principally on the words "or the bulk thereof." It is said on behalf of the appellants that "bulk" is a vague and indefinite word, which introduces uncertainty into the clause. If this is so, the appeal must succeed. As Lord Cranworth said in *Clavering v. Ellison* ⁹: "From the earliest times, one of the cardinal rules on the subject has been this: that where a vested estate is to be defeated by a condition on a contingency that is to happen afterwards, that condition must be such that the court can see from the beginning, precisely and distinctly, upon the happening of what event it was that the preceding vested estate was to determine." The same rule was expressed by Parker J. in *In re Sandbrook* ¹⁰ in the following terms: "... conditions subsequent, in order to defeat vested estates, or cause a forfeiture, must be such that from the moment of their creation the court can say with reasonable certainty in what events the forfeiture will occur."

There is no doubt that the shifting clause now under consideration is a condition subsequent; it is therefore necessary to consider the question whether, from the moment of the testatrix's death, the court has been able to say, with reasonable certainty, in what events a forfeiture of the Dallam Tower Estate will occur. If this question is answered in the negative, the shifting clause is void, and the interests of Admiral Bromley and his issue in the Dallam Tower Estate are in no way affected by the fact that in 1906 Admiral Bromley succeeded to the whole of the Stoke Hall Estate.

A convenient method of answering this question is to set out the steps which must be taken, if it is alleged, at any time after the testatrix's death, that a particular individual, whom I shall

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⁹ 7 H.L.C. 707, 725.

¹⁰ [1912] 2 Ch. 471, 477.

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The first step is to establish that XY is "a son, daughter or " other issue of the said Henry Bromley within the scope of the " limitations hereinbefore contained." Harman J. construed the words " within the scope of the limitations hereinbefore " contained " as meaning " entitled in possession under the " limitations hereinbefore contained." He remarked that this was " perhaps not a very easy construction of the words," but he adopted it in order to give effect to what he thought must be the testatrix's intention, and he placed some reliance on the use of the word " determine."

My Lords, this point was fully dealt with by Jenkins L.J. in a passage with which his brethren agreed. He thought¹¹ that the phrase in question meant simply " to whom the property is " limited under the limitations hereinbefore contained " and was unambiguous. I agree with his conclusion and with each step in his reasoning.

Next it must be established that XY has " by any means " whatsoever become actually entitled to the possession or the " receipt of the rents and profits of the family estate of Sir Henry " Bromley the father of the said Henry Bromley meaning thereby " the Stoke Hall Estate near Newark in the County of Nottingham " or the bulk thereof whether consisting of the same premises as " that estate now consists of or in any manner altered in the way " of addition substitution diminution or otherwise and so that " this proviso shall not be rendered inoperative by reason of such " estate or any part or parts thereof being subjected to any " charges or incumbrances whatsoever." The words " by any " means whatsoever " are, to my mind, capable of only one meaning, though they might, in certain circumstances, give rise to great hardship, and it is not suggested that there is any difficulty in identifying the estate which the testatrix described as " the " Stoke Hall Estate." At the date of her will, and also at the date of her death, Sir Henry Bromley, the fourth Baronet, was tenant for life in possession of the Stoke Hall Estate.

I shall first consider a case in which it is alleged that XY has become entitled to the whole of the Stoke Hall Estate. The person so alleging must establish that the property to which XY has succeeded can be identified with the Stoke Hall Estate mentioned in the will. There may have been, since the testatrix's

¹¹ [1950] 2 All E.R. 955, 961.

death, disentailing deeds, resettlements of part only of the estate, sales and mortgages. All these events, however, have been contemplated by the testatrix in the words which she has used, and any difficulties which might arise as to identity would be merely difficulties of proof. They would not be the result of any ambiguity in the testatrix's will.

Next I consider a case in which it is alleged that XY has become entitled not to the whole but to "the bulk" of the Stoke Hall Estate. I shall take, as an example, a case in which, as a result of various dealings, the Stoke Hall Estate is represented, at the time when the succession opens, by £50,000 Consols, a grouse moor and three farms, and XY has succeeded to part of this collection of properties. How is it to be determined whether the part to which he has succeeded is or is not "the bulk" of the Stoke Hall Estate?

My Lords, in my view the ordinary meaning of the words "the bulk" is "the greater part," and I see no reason for giving them any other meaning in this will. Nor do I see any reason to doubt that, in the context in which they occur, they mean the greater part in value. If the testatrix had been referring to land, and nothing but land, there might have been some doubt whether she meant the greater part in acreage or the greater part in value; but she is referring to an estate which may be "in any manner altered in the way of addition substitution diminution or otherwise," so that the subject-matter may consist partly of land, partly of money or investments and partly of chattels settled to devolve as heirlooms. When the phrase "the bulk" is applied to such a subject-matter, I can give it no other meaning than "the greater part in value."

It follows that, if a doubt arose as to whether XY had become entitled to the bulk of the Stoke Hall Estate, it would only be necessary to value the items of property making up the Stoke Hall Estate at the time of XY's succession, and then to ascertain whether the value of the items to which XY became entitled was or was not more than half the value of the whole. Here again practical difficulties as to the basis of valuation might arise, but they would not be due to any ambiguity in the words used by the testatrix.

The result is that in my judgment the shifting clause satisfies the test laid down in *Clavering v. Ellison*¹² and in other cases and is valid. And, if its validity is established, there can be no

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doubt that Admiral Bromley comes within its terms. He is one of the "issue of the said Henry Bromley within the scope of "the limitations hereinbefore contained," and in the year 1906 he became "actually entitled in possession" to the Stoke Hall Estate. Thereupon the Admiral and his issue became excluded from the succession to the Dallam Tower Estate.

I would dismiss the appeal.

LORD TUCKER. My Lords, I concur.

Appeal dismissed.

Solicitors: *Rider, Heaton, Meredith & Mills.*

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[HOUSE OF LORDS.]

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Nov. 29.

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APPELLANTS;

AND

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RESPONDENT.

Revenue—Income tax—Contracts of deceased actor and film producer—Share in gross receipts or profits from distribution of films—Death before amount of share ascertained—Agreement by executors varying remuneration under contracts—Extent of liability to tax—Income Tax Act, 1918 (8 & 9 Geo. 5, c. 40), Sch. D.

A film producer and actor, having agreed to produce and act in certain films in consideration of certain lump sums and a share in the receipts or profits, died and sums in respect of that share were received by his executors:—

Held, that these sums were not chargeable to income tax in their hands under Case II of Sch. D or otherwise, since they represented money earned while he was following his vocation and were taken to be covered by the assessment then made.

Bennett v. Ogston (1930) 15 Tax Cas. 374, 378 applied.

Decision of the Court of Appeal (sub nom. *Purchase v. Stainer's Executors*) (1950) 29 A.T.C. 74 reversed.

APPEAL from the Court of Appeal (Evershed M.R. and Somervell L.J., Jenkins L.J. dissenting).

* *Present*: LORD SIMONDS L.C., LORD NORMAND, LORD MORTON OF HENRYTON, LORD TUCKER and LORD ASQUITH OF BISHOPSTONE.

This was an appeal to the House of Lords by the appellants, Florence Gospel and Harold Morgan, the executors of Leslie Howard Stainer, deceased, from a decision of the Court of Appeal reversing a decision of Croom-Johnson J., who had dismissed an appeal by the respondent, H.M. Inspector of Taxes, upon a case stated by the Commissioners for the Special Purposes of the Income Tax Acts. The effect of the order of the Court of Appeal was partly to uphold and partly to reverse the decision of the Special Commissioners, and the respondent cross-appealed in so far as the order was adverse to the Crown, but the cross-appeal was withdrawn at the bar of the House of Lords. The appeals arose on assessments to income tax for 1944-5, 1945-6 and 1946-7 made on the appellants.

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The facts, stated by Lord Simonds, were as follows: Leslie Howard Stainer, who was professionally known as Leslie Howard, was killed by enemy action on or about June 1, 1943. He had in the exercise of his profession as a film actor and producer entered into certain contracts, current at his death, under which the sums in question were paid. They were set out sufficiently in the judgment of Jenkins L.J. in the Court of Appeal.

The relevant contracts were:—

(a) An agreement of October 31, 1940, made between British National Films Ltd. and Mr. Howard under which he was to act as producer and associate director and take the leading part in a film called "Mr. Pimpernel Smith." He was also to assign to the company the story and the "shooting script" of which he was the owner. It was expressly provided that the picture when completed and all rights therein were to be the sole property of the company and that nothing in the agreement was to constitute a partnership between the parties. For his services in producing, directing and acting in the picture Mr. Howard was to be paid by way of remuneration a sum of £5,000 payable during production and a certain proportion of the gross receipts from the distribution after certain agreed deductions. This proportion was to be paid to him monthly by the company as the gross receipts came in. Mr. Howard fully performed the services required of him, the film was made in 1940, and he duly received the sum of £5,000. No question arose in regard to this sum. But during the years ended April 5, 1945, 1946, and 1947, sums were received by the company from the distribution of the picture and sums representing the proportions due to Mr. Howard were paid to the appellants as his executors without any deduction

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(b) An agreement of December 13, 1940, between Ortus Films Ltd. and Mr. Howard under which he was to perform in a film to be called "The Forty-Ninth Parallel," the full copyright in which was to belong to the company. As remuneration Mr. Howard was to receive, and duly received, the sum of £2,000 (as to which no question arose), and he was also to receive a sum equal to 14/49ths of the company's share in the ultimate net profits of the distribution of the film. Under this agreement also sums were paid to the appellants in the years ended April 5, 1945, and 1946, and were included in the disputed assessments.

(c) An agreement of September 18, 1941, between Misbourne Pictures Ltd. and Mr. Howard under which he was to act as producer-director of, and perform in, a film to be called "The First of the Few," the full copyright of the work being vested in the company. Under this agreement Mr. Howard's remuneration was to be (1) a sum of £5,000 during the making of the film; (2) a sum of £10,000 to be paid within two years and six months after the trade show of the film; and (3) a sum equal to two-thirds of the actual sums from time to time received by the company in respect of the exploitation of the film, such two-thirds share to be paid within one year from the receipt by the company from time to time of such sums. This film was made in 1941 and 1942 and the trade show was in August, 1942. No question arose with regard to the sum of £5,000 which was duly paid to Mr. Howard in his lifetime. Mr. Howard agreed with the company in his lifetime that there should be a variation of the remuneration secondly and thirdly provided for but died before any agreement had been signed. The appellants, however, agreed with the company that for the £10,000 there should be substituted the sum of £11,000 payable by four instalments of £2,000 each not later than December 31, 1943, 1944, 1945, and 1946, and a final instalment of £3,000 payable not later than December 31, 1947, and further that in lieu of the two-thirds of the sums received in respect of the exploitation of the film the company was to pay a sum equal to two-thirds of the sum so received in excess of £11,000. During the years ended April 5, 1945, and 1946, sums were paid to the appellants by the company without deduction of tax and these sums were included in the disputed assessments.

Therefore the assessments included (a) certain instalments of a lump sum and (b) periodical payments of certain gross receipts. The appellants appealed against the assessments to the Special Commissioners, who discharged them, but at the request of the respondent stated a case for the opinion of the High Court of Justice (King's Bench Division). On November 1, 1949, Croom-Johnson J. dismissed the appeal and confirmed the determination of the Special Commissioners. The respondent accordingly appealed to the Court of Appeal, which allowed the appeal except so far as related to the instalments of the sum of £11,000 and the 14/49ths under contract (b). The court (Evershed M.R., and Somervell and Jenkins L.JJ.) were unanimous in holding that the instalments of the sum of £11,000 and the said 14/49ths were not assessable to tax, but by a majority (Jenkins L.J. dissenting) held that the other payments were so assessable. The cross-appeal of the Crown was withdrawn, and it was only with these payments that the House of Lords was concerned.

Graham-Dixon K.C. and *Tribe* for the appellants. The payments here in question (viz., all the sums received by the executors under the respective agreements) were and are professional remuneration earned by the deceased in the course of carrying on his profession as an actor and producer during his lifetime. But for his death they would have been included as receipts of his profession in the computation of the profits and gains thereof under Case II of Sch. D. They can only be assessed under that Case. The source of the payments was not the particular contracts, but the professional activities of the deceased during his lifetime. With his death the activities ceased, and so the source ceased to exist. The source of the payments did not change its character when the death took place nor was it replaced by any new source of income owned by the executors. Since the executors have no source, therefore they cannot be under any liability for income tax. They were paid what they were paid because the deceased had earned it and not because they had in their hands any income bearing assets. The agreements did not provide for the acquisition by the deceased, by way of remuneration or otherwise, of any such assets. The statement of principle in *Bennett v. Ogston*¹ is relied on. The statutory provisions relating to the assessment and the computation of tax under Sch. D support it. These sums, being

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remuneration, have never possessed the quality of pure income and none of them could have been assessed as annual payments under Case III. The fact that they can recur is not sufficient in itself to bring them within that Case. To constitute an annual payment assessable under Case III a receipt must not only be capable of recurrence but must also be in the nature of a pure income profit. None of the sums received by the executors were of that nature. If a sum is truly remuneration it is not Case III income at any stage. Further, as regards Case VI, that Case is ruled out by its own terms. Sums payable as remuneration of a profession cannot be subject to assessment under it. The assumption that these are annual payments, forgetting that they are remuneration, is one of the fallacies in the decision of the Court of Appeal. [They referred to *Davies v. Braithwaite*²; *Bennett v. Marshall*³; *Harrison v. John Cronk & Son Ltd.*⁴; *Hillerns v. Murray*⁵; *Earl Howe v. Inland Revenue Commissioners*⁶; *Asher v. London Film Productions Ltd.*⁷; *Inland Revenue Commissioners v. Ramsay*⁸; *Foley v. Fletcher*⁹; *Gardner, Mountain & D'Ambrumenil v. Inland Revenue Commissioners*¹⁰; *Isaac Holder & Sons Ltd. v. Inland Revenue Commissioners*¹¹; rule 3 (b) of the rules applicable to Cases I and II of Sch. D; Finance Act, 1926, s. 31; and Finance Act, 1938, s. 26.]

Grant K.C. and *Reginald Hills* for the Crown. The cross-appeal is altogether withdrawn. On the main appeal, the assessments were rightly made so as to bring into charge to income tax the payments received by the executors under the contracts. The argument that these sums, if received by the deceased in his lifetime, would have fallen under Case II and that therefore they cannot be chargeable at all in the hands of the executors is a non sequitur. It is not sought to tax the deceased. Nor are the executors carrying on any profession. They are assessed because they are the persons to whom these sums arose. On the facts of this case these sums are to be treated as not having arisen to the deceased in his lifetime in the years when he was carrying on his profession. On the death of the deceased, his executors acquired certain assets, including

² [1931] 2 K.B. 628, 636.³ [1938] 1 K.B. 591.⁴ [1937] A.C. 185.⁵ (1932) 146 L.T. 474, 479; 17 Tax Cas. 77, 89.⁶ [1919] 2 K.B. 336, 352.⁷ [1944] K.B. 133, 139.⁸ (1935) 154 L.T. 141; 20 Tax Cas. 79.⁹ (1858) 3 H. & N. 769.¹⁰ (1947) 177 L.T. 16, 19; 29 Tax Cas. 69, 92.¹¹ (1924) 12 Tax Cas. 765, 772-3.

the rights under these contracts. From their point of view these sums payable thereunder had all the qualities of annual payments. Their source lies, not in the professional activities which are gone, but in the contracts. The deceased could never have been assessed in respect of these sums and the executors are being assessed because they are the persons entitled under the contracts to receive them. For this purpose the pre-death history is not relevant. The contracts were income-bearing assets, similar to the income-bearing asset in *Bennett v. Ogston*¹²: see the judgment of Jenkins L.J. in the Court of Appeal in the present case.¹³

The character of the payments will vary according to the character of the recipient at the time of receipt. By "character" is meant the circumstance whether or not he is carrying on the profession in respect of which he earned the receipt. Professional remuneration may assume a different character for tax purposes if the taxpayer dies or retires. The deceased having died before he received these sums, they were in his executors' hands (as they would have been in his own if received after retirement) no longer profits or gains of his profession. They did not come within the net of Case II because in his lifetime it would have been impossible to value them. On the authorities, in such cases sums like these are left out of assessment and do not come in at all until they are received. The sums received by the executors were annual payments chargeable within Case III. Alternatively, they were chargeable to income tax as annual profits within Case VI. [They referred to *Gardner, Mountain & D'Ambrumenil v. Inland Revenue Commissioners*¹⁴; *Harrison v. John Cronk & Son Ltd.*¹⁵; Income Tax Act, 1918, s. 18, and Finance Act, 1938, s. 26.]

Reginald Hills following. On every commercial principle it is unthinkable that the deceased should have been taxed in his lifetime on any other basis than he was. In such cases the question is whether there is any sum due. One does not bring in contingent receipts when the conditions must be fulfilled before there is anything due. When, for instance, a man is carrying on a financial business lending money, interest comes into his account as a trade earning, but in his assessment there is not brought in all the interest he may ever earn on that money, his prospective receipts; one waits till they are due.

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As Evershed M.R. said in the Court of Appeal,¹⁶ the fact that these sums would, if received in the lifetime of the deceased, have been brought into account as professional receipts for the purposes of his remuneration under Case II is not conclusive. It does not follow that this has the sterilizing effect that thereafter they must for ever be excluded. The contracts were made in return for the promise of the deceased to give his services. Under the contracts he had a right to receive a proportion of the receipts from films which might be exhibited for a considerable period of years. The contracts were income-bearing assets. If a financier receives bonds in the course of his business and after he retires receives interest, that can be taxed although it could formerly have been taxed as a trade receipt. Or if a shipyard owner in Southampton Water has a yacht which he sometimes charters out and sometimes uses himself, then if he makes a contract to charter it to X for six years, if he wants it, and afterwards retires from business, the payments would be taxable. In the present case until the films are shown nothing is due and there is nothing which is a trade receipt. The income which the executors get is nothing which was ever a trade receipt. The position is very like that of a copyright royalty. [He referred to *Absalom v. Talbot*.¹⁷]

Graham-Dixon K.C. in reply. These payments are not income in the hands of the executors. Payments under the contracts were income of the deceased, and if he had lived to retire he would only have been collecting money for work done before he retired. The Crown's fallacy is to treat the contracts as assets given to the deceased in return for his services. These sums are remuneration. The case is not like that of a copyright which resembles a block of shares, acquired in the course of exercising a profession, which afterwards continues to produce income.

Their Lordships took time for consideration.

November 29. LORD SIMONDS L.C. My Lords, the question in this appeal is whether the appellants, who are the executors of the late Leslie Howard Stainer, are assessable to income tax on certain sums which had been earned by him in the course of his profession as a film actor and producer but in the events that happened fell due for payment after his death. A cross-appeal was presented on behalf of the Crown in respect of certain other

¹⁶ 29 A.T.C. 74, 75.

¹⁷ [1944] A.C. 204.

sums which in the courts below were held not to be assessable to tax, but it was withdrawn at the Bar of your Lordships' House. [His Lordship stated the facts and continued:]

My Lords, having given to this case all the consideration that I can, I am conscious that I can add little or nothing to the dissenting judgment of Jenkins L.J., with every word of which I agree. I respectfully adopt it and only make these observations in deference to the opinion of the majority of the Court of Appeal and the argument of learned counsel for the respondent.

It will be convenient, my Lords, if I state the material provisions of the Income Tax Act, 1918. The disputed assessments are made under Case III or, alternatively, Case VI of Sch. D. Tax under Sch. D is chargeable under paragraph 1 "in respect of (a) The annual profits or gains arising or accruing . . . (ii) to any person residing in the United Kingdom from any trade profession employment or vocation whether . . . carried on in the United Kingdom or elsewhere . . . ; and (b) All interest of money annuities and other annual profits or gains not charged under Sch. A, B, C or E, and not specially exempted from tax. . . ." It is chargeable under a number of Cases, of which I must mention II, III and VI. Case II is "Tax in respect of any profession employment or vocation not contained in any other Schedule"; Case III is "Tax in respect of profits of an uncertain value and of other income described in the rules applicable to this Case"; and Case VI is "Tax in respect of any annual profits or gains not falling under any of the foregoing Cases, and not charged by virtue of any other Schedule." The tax is chargeable subject to and in accordance with the rules applicable to the several Cases and of these rules I need mention two only. First, a rule applicable to Case II provides that "The tax shall extend to every employment [as therein mentioned] and shall be computed on the full amount of the balance of the profits, gains and emoluments of the professions, employments or vocations." Secondly, rule 1 of the rules applicable to Case III provides that "The tax shall extend to (a) any interest of money, whether yearly or otherwise, or any annuity, or other annual payment [as therein mentioned] either as a charge on any property of the person paying the same by virtue of any deed or will or otherwise, or as a reservation thereout, or as a personal debt or obligation by virtue of any contract, or whether the same is received and payable half-yearly or at any shorter or more distant periods."

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It is common ground between the parties that the position would be precisely the same if Mr. Howard had not died but had retired from his profession in the year 1943. His liability to tax would be the same as that of his executors. It is further agreed that, had Mr. Howard been still carrying on his profession at the time when the sums in dispute were received, they would have been properly included in the account of the profits, gains and emoluments of his profession under Case II and would not have fallen under any other Case. It was not suggested that the sums received in respect of any particular contract could be isolated: all of them would be aggregated with any other profits of his professional activity and the balance after deducting the expenses properly deductible would be chargeable under Case II: see *Davies v. Braithwaite*.¹⁸ But, it was said, and this is the short point of the case, Mr. Howard died before the sums were received, and in the hands of his executors, as they would have been in his hands if received by him after his retirement, they are no longer to be regarded as the profits and gains of his profession but assume a different character and fall under Case III or Case VI.

My Lords, if this contention had not found favour with the learned Master of the Rolls and Somervell L.J. I should not have thought it arguable. The principle which is applicable here was stated with his usual clarity by Rowlatt J. in *Bennett v. Ogston*,¹⁹ and I will cite his words: "When a trader or a follower of a profession or vocation dies or goes out of business . . . and there remain to be collected sums owing for goods supplied during the existence of the business or for services rendered by the professional man during the course of his life or his business, there is no question of assessing those receipts to income tax: they are the receipts of the business while it lasted, they are arrears of that business, they represent money which was earned during the life of the business and are taken to be covered by the assessment made during the life of the business, whether that assessment was made on the basis of bookings or on the basis of receipts." I am satisfied that this is a correct statement of the relevant principle of income tax law, though I have some doubt—it is not necessary to decide it—whether the learned judge correctly applied the principle in the case before him. If so, there seems to me to be an end of the case. How else could these sums come to the hands of Mr.

¹⁸ [1931] 2 K.B. 628.¹⁹ 15 Tax Cas. 374, 378.

Howard or his executors than as the remuneration for his professional activities, the reward for services rendered by him during his life and unpaid for at his death? It appears to me wholly irrelevant that they were not payable until after his death and equally so that they were not and could not be quantified until after that event. They retained the essential quality of being the fruit of his professional activity. If in all the circumstances it was not possible to bring the sums into account in the years in which they were earned, as I will assume to be the case, the result is not to change the character of the payment but to exhibit that some professional earnings may escape the income tax net. The withdrawal of the cross-appeal shows that lump sum payments made in the circumstances of the present case do so escape.

My Lords, it appears to me that the issue is confused by raising in general terms the question whether professional remuneration may in certain circumstances assume a different character for tax purposes when the taxpayer is dead or has retired. At least the case of *Asher v. London Film Productions Ltd.*²⁰ is no authority for such a proposition. In that case there was no question of the same sum assuming a different quality in changing conditions. I am content to assume that there may be such a case though I find it difficult to imagine. But here I cannot see how or where the change takes place. The source of these payments was the professional activity of Mr. Howard: it was never anything else. It is true that his remuneration took the form of annual payments which, if other conditions were satisfied, might fall within Case III. But other conditions were not satisfied, for ex hypothesi the source of the remuneration was the exercise of a profession falling within Case II.

Then your Lordships were pressed, particularly by junior counsel for the Crown, with the argument that the remuneration of Mr. Howard took the form of an "income-bearing asset" which became assessable after his death in the hands of his executors. I am not sure that I correctly apprehend the argument, though I can well understand that, if a professional man receives as remuneration for his services the sum of £1,000 $2\frac{1}{2}$ per cent. Consols and retains them, he will suffer deduction of tax from the interest. But I do not understand in what sense the sums of money receivable by Mr. Howard can be described as an income-bearing asset. At one time it appeared to be urged

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that the several contracts, which at once imposed obligations upon Mr. Howard and created rights in him, were income-bearing assets, the income being the remuneration paid under them. Jenkins L.J.²¹ described this argument as "placing a strained "and artificial construction on these contracts" and I am content to dismiss, without using more vigorous language, a contention that wholly disregards both the form and substance of the transaction.

If I am right in thinking that the sums in question were not assessable under Case III because they were nothing else than remuneration professionally earned by Mr. Howard in his lifetime, this disposes also of the alternative claim under Case VI.

In the result I am of opinion that the appeal should be allowed and the cross-appeal dismissed, with costs, and I move your Lordships accordingly.

LORD NORMAND. My Lords, I concur.

LORD MORTON OF HENRYTON. My Lords, I also concur.

LORD TUCKER. My Lords, I also concur.

LORD ASQUITH OF BISHOPSTONE. My Lords, I entirely agree with the opinions expressed by my noble and learned friends and would only wish to add a few sentences.

It seems clear that the payments whose liability to tax is in issue were exclusively the fruit or aftermath of the professional activities of Mr. Leslie Howard during his lifetime. This was, as a matter of historical fact, their source, and their only source. The fact that he died before some of this fruit had been garnered or its amount could be ascertained cannot alter that historical fact. He, and he alone, had done everything necessary to provide the harvest.

Secondly, I adhere to the statement of principle—never apparently challenged in any reported case—of Rowlatt J. in *Bennett v. Ogston*,²² where, in a passage already cited by the Lord Chancellor, he says: "When a trader or a follower of a profession or vocation dies or goes out of business . . . and there remain to be collected sums owing for goods supplied during the existence of the business or for services rendered by the professional man during the course of his life or his business, there is no question of assessing those receipts to income tax:

²¹ 29 A.T.C. 74, 86.

²² 15 Tax Cas. 374, 378.

“ they are the receipts of the business while it lasted, they are arrears of that business, they represent money which was earned during the life of the business and are taken to be covered by the assessment made during the life of the business, whether that assessment was made on the basis of bookings or on the basis of receipts.” Applying this principle to the facts of the present case *prima facie* the resulting conclusion can only be that the payments in issue escape tax.

It is, however, contended by the Crown that in *Bennett v. Ogston*²³ the reason why the principle involving exemption did not apply was that when the moneylender died there was outstanding an income-bearing asset (namely, that part of the principal which was then unrepaid) which continued to earn income, as it were, in its own right. It was argued for the Crown that the same was the case here, the income-bearing asset consisting of the contracts made by Leslie Howard whereunder the payments in question were posthumously made.

There seems to me, however, to be a very clear distinction between “ income-bearing assets ” for the purpose of this type of case and the contracts in question. If Mr. Leslie Howard had stipulated for payment in blocks of shares or bonds, or any other instruments which by their independent vitality generate income, the dividends or interest might well have been taxable in the hands of his executors. The contracts in the present case enjoy, in my view, no such independent vitality. The consideration for what Mr. Howard was to do—to act or manage—was not the grant of a contract or contracts but the payment of money under the terms of those contracts. Mr. Howard acted for money; he did not act for contracts. The contracts were mere incidental machinery regulating the measure of the services to be rendered by him on the one hand and, on the other, that of the payments to be made by his employers; they were not the source, but the instrument of payment, and his death, in my view, did nothing to divest them of that character. I agree unreservedly with the judgment of Jenkins L.J. and respectfully concur with the motion of the Lord Chancellor that this appeal should be allowed.

Appeal allowed.

Solicitors: *Walter, Burgis & Co.; Solicitor, Inland Revenue.*

²³ 15 Tax Cas. 374.

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[HOUSE OF LORDS.]

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Oct. 15, 16,
17, 18;
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AND
ROYAL NORWEGIAN GOVERNMENT . . . RESPONDENT.

Shipping—Collision—Damage—Temporary repairs—Permanent repairs impracticable in Great Britain—Vessel sent to New York expressly for permanent repairs—Further damage caused by heavy weather during voyage—Immediate repairs necessary—All repairs executed concurrently—Detention longer than needed for repairs of collision damage—Whether damages for detention during repairs of collision damage recoverable.

A ship damaged in a collision through the fault of another ship received temporary repairs which rendered her seaworthy but on the way to a port where permanent repairs were to be effected she encountered heavy weather and thereby suffered damage rendering her unseaworthy and requiring immediate repair. At her destination both sets of repairs were effected concurrently, the work occupying 30 days. Ten days would have been required for the collision damage if executed separately:—

Held, that the owners of the ship at fault in the collision were not liable for damages in respect of the 10 days' detention, since the heavy weather damage was not a consequence of the collision and the owners of the damaged ship sustained no loss of profitable time by reason of the fact that for 10 out of the 30 days occupied in repairing that damage she was also undergoing repairs necessitated by the collision.

The Vitruvia, 1925 S.C.(H.L.) 1, 21 Ll.L.Rep. 280, followed; *The Hawk*, 1928 S.L.T. 71, 30 Ll.L.Rep. 32 approved; *The Haversham Grange* [1905] P. 307 explained. Distinction drawn in that case between liability for detention and liability for dock dues disapproved.

Decision of the Court of Appeal (sub nom. *The Carslogie*) [1951] P. 167 reversed.

APPEAL from the Court of Appeal (Bucknill and Denning L.JJ. and Lloyd-Jacob J.).

The facts, stated by Viscount Jowitt, were as follows: On November 26, 1941, the motor vessel *Heimgar* was lying at anchorage off Oban. She was due to join a convoy to West African ports. Whilst she was so lying at anchor the steamship

* *Present*: VISCOUNT JOWITT, LORD NORMAND, LORD MORTON OF HENRYTON, LORD TUCKER and LORD ASQUITH OF BISHOPSTONE.

Carslogie collided with her. It was admitted that the *Carslogie* was solely to blame for the accident. On November 27 the *Heimgar* was surveyed at her anchorage for the purpose of ascertaining the nature and extent of damage she had sustained as a result of the collision; and this having been ascertained Lloyd's surveyor issued a certificate of seaworthiness enabling the ship to go to a repairing port in the United Kingdom. Accordingly she proceeded to Greenock on November 28 and arrived there on November 30. Owing to war restrictions all the work required could not be carried out, and temporary repairs were effected at Port Glasgow. In the meantime, and before these temporary repairs had been effected, the representative of the owners of the *Heimgar* (the respondents) had arranged with the Ministry of War Transport to send the vessel to the United States instead of to West Africa. This change of voyage was made primarily in order that she might go to a port at which permanent repairs could be effected. It was also considered by the owners desirable to take the opportunity of her being in dock to inspect her engines which had been giving some trouble. The port originally suggested was Chester, Pennsylvania, as it was hoped that a firm at Chester who were very experienced with Diesel motors might make any necessary adjustments to the engines. In fact Chester proved impossible and she was allocated to New York. On the completion of her temporary repairs she was given a certificate of seaworthiness authorizing her to be continued in her present class without fresh record of survey, subject to certain permanent repairs, at the owners' convenience, and to her propeller being renewed at the owners' convenience, and she was stated to be fit to carry dry and perishable cargoes: see the Lloyd's surveyor's certificate of seaworthiness dated December 4, 1941.

When the vessel sailed for New York after the completion of the temporary repairs she was in a seaworthy condition, but during her crossing of the Atlantic she experienced heavy weather and sustained considerable damage thereby which rendered her unseaworthy. It was therefore necessary for her to go into dry dock at New York to have this heavy weather damage repaired, apart altogether from the desirability of effecting permanent repairs in respect of the collision damage.

She remained in dry dock in New York from January 2 to March 1, 1942, being thus off hire for a period of approximately 50 days. During her time in dry dock the repairs due to the collision, the engine repairs and the heavy weather repairs were

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all done concurrently. It was agreed that 10 days out of the 50 should be allocated to the repair of the collision damage and that 30 days would have been required for the heavy weather damage.

The question for decision was whether the owners of the *Carslogie* (the appellants) were liable to pay, in addition to the cost of the repairs occasioned by the collision, the loss of chartered hire for 10 days, whilst the *Heimgar* was in dock, together with certain items in respect of war risk insurance and war bonus. These three items were considered as all turning on the same principle, and it was agreed that they succeeded or failed together. The registrar allowed the sum claimed by way of damages for detention and allowed the two remaining items as a necessary consequence of allowing the first item. He considered that where a collision had taken place in consequence of which the innocent ship was on her way to the repairers when another casualty occurred which necessitated immediate repairs, the owner was entitled to recover damages for detention in respect of the collision repairs from the owners of the wrong-doing ship. Willmer J. reversed this decision, and the Court of Appeal (Bucknill and Denning L.JJ. and Lloyd-Jacob J.) reversed this decision of the judge and restored the decision of the registrar. From this decision of the Court of Appeal an appeal was brought to the House of Lords.

D. A. Scott Cairns K.C. and *Rena* for the appellants. The dock dues have been apportioned and no question arises as to liability for them. In the cases in which the law relating to damages in respect of detention, where there are several causes of damage, has been worked out, and also in the somewhat similar line of cases relating to dock charges, the underlying principle is that the owners of a ship are only entitled to damages in respect of her detention if it is established that apart from the execution of the repairs for which the wrong-doer is responsible she would have been a profit-earning vessel. This principle applies irrespective of the order of the events which have occurred. The occurrence of damage to a ship in collision with a wrong-doing ship and the decision of the owners of the damaged ship to have the damage repaired does not confer on these owners any vested right to damages for detention. The doctrine deduced from *The Haversham Grange*¹ that, when a ship is detained for concurrent repairs following on two casualties, the detention is to be attributed

¹ [1905] P. 307.

to the first casualty rather than the second is unsound in law. Alternatively, that doctrine, if it ever has any application, applies only where both casualties result from the wrongful acts of other parties and the question is which of them has to pay for the detention.

The rule applicable to the present case is that where a ship is detained for two sets of repairs which are done concurrently, then if one set is immediately necessary (in the sense of necessary to make her seaworthy) and the other is not, the party responsible for the former state of affairs must bear the cost of the detention to the exclusion of the other party. According to the rule deduced from *The Haversham Grange*,¹ if both sets of repairs are immediately necessary then the party responsible for the damage first incurred must bear the cost of the detention to the exclusion of the other party. But since *Marine Insurance Co. Ltd. v. China Transpacific Steamship Co. Ltd. (The Vancouver)*,² whenever dock dues are incurred in respect of two matters, both equally necessary, there should be a division of the liability. When either set of repairs is not immediately necessary—the shipowner's own repairs and the damage repairs—it is the shipowner's duty to mitigate the damage and have both sets of repairs done together, so that the ship is not detained longer than if he had merely had his own repairs done. Here the *Heimgar* was not detained for 10 days or for any period as a result of the collision, for during the 10 days that the collision damage was being repaired the other repairs were being effected. If the collision had never happened she would still have been detained for the 50 days for which she was immobilized; that is common ground. If one cause of the laying up be of so compelling a character that the ship in question could not have traded at all without repair, then the laying up must be regarded as consequent on that damage, and any other detention for any other cause is not to be regarded as causing loss, because she was not a money-making machine. Here the heavy-weather damage was the only damage which rendered the ship unseaworthy and therefore it was the effective cause of the detention. One cannot draw a line immediately after the collision damage has occurred; one must take everything into account including the fact that, in the case of this ship, she had, owing to heavy-weather damage, ceased to be a profit-earning

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¹ [1905] P. 307.² (1886) 11 App.Cas. 573.

H. L. (E.) machine. This is not a case within the rule in *The Haversham Grange*.³

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In a case where there are two torts, the first resulting in the value of the ship being diminished by half and the second resulting in its total loss, the first tortfeasor is liable for half the value of the ship and the second for her value at the time she was lost. So too where a boxer is injured and disabled from earning his living by his profession and subsequently as a result of a second injury loses his leg, the second tortfeasor does not have to pay damages to him in respect of his inability to follow his profession, since he was not at the time capable of earning his living as a boxer. Again, if as a result of an accident it is established that a person must be prevented from earning his living for five years, but at the end of one year he contracts tuberculosis and is obliged to remain in a sanatorium for the next six years, he cannot claim from the person responsible for the injury damages for loss of earnings beyond the first year, since after that he would not have been earning in any event. He can only claim damages in respect of his loss of earning power.

[They referred to *Ruabon Steamship Co. Ltd. v. The London Assurance* ⁴; *The Acanthus* ⁵; *The Kingsway* ⁶; *The Glenfinlas* ⁷; *Marine Insurance Co. Ltd. v. China Transpacific Co. Ltd.* ⁸; *Williamson v. John I. Thornycroft & Co. Ltd.* ⁹; *The Port Denison* ¹⁰; *Vitruvia Steamship Co. Ltd. v. Ropner Shipping Co. Ltd.* ¹¹; *Admiralty Commissioners v. Chekiang (Owners)* ¹²; *The Cameronia v. The Hauk* ¹³; *Ministry of Pensions v. Chennell* ¹⁴; *The Kursk* ¹⁵; *Northwestern Utilities Ltd. v. London Guarantee and Accident Co. Ltd.* ¹⁶; *Smith, Hogg & Co. Ltd. v. Black Sea and Baltic General Insurance Co. Ltd.* ¹⁷; *Monarch Steamship Co. Ltd. v. Karlshamns Oljefabriker A/B* ¹⁸ and *The Clan Robertson*.¹⁹]

Carpmael K.C. and *Vere Hunt* for the respondents. A parallel case to the present would be that of a boxer with an arm severely injured as a result of a tort going to hospital in an ambulance

³ [1905] P. 307.
⁴ [1900] A.C. 6.
⁵ [1902] P. 17.
⁶ [1918] P. 344.
⁷ *Ibid.* 363.
⁸ 11 App.Cas. 573, 588.
⁹ [1940] 2 K.B. 658.
¹⁰ Roscoe on The Measure of Damages in Maritime Collisions, 3rd ed., p. 171.
¹¹ 1925 S.C.(H.L.) 1, 5; 21 Ll.L. Rep. 280, 282.
¹² [1926] A.C. 637, 653.
¹³ 1928 S.L.T. 71; 30 Ll.L.Rep. 32.
¹⁴ [1947] K.B. 250, 253.
¹⁵ [1924] P. 140.
¹⁶ [1936] A.C. 108, 126-8.
¹⁷ [1940] A.C. 997.
¹⁸ [1949] A.C. 196.
¹⁹ (1922) House of Lords Printed Cases, 1951, cited in the appendix to this case, p. 100.

when, either as a result of a skid without negligence or as a result of a collision with a second tortfeasor, he suffers a second injury and loses a leg. The second injury is connected with the first. The loss of the leg is a direct consequence of the injury to the arm caused by the first tortfeasor, who should bear the responsibility for both. If the loss of the leg were unconnected with the loss of the arm it would be otherwise. In the case of an injured man who is subsequently sent to prison, damages for loss of earnings cannot be recovered by him since he has himself put it out of his capacity to earn.

In the present case the respondents were entitled to choose a reasonable and convenient time and place to carry out the permanent collision repairs. The time and place chosen by them were reasonable and in all the circumstances there was an immediate necessity. Necessity must be looked at from the point of view of the reasonable business man: see *The Cameronia v. The Hawk* ²⁰ and Roscoe on *The Measure of Damages in Maritime Collisions*, 3rd ed., p. 71. It was a business necessity for this ship to go to New York. On the occurrence of the collision damage the respondents were entitled there and then to repair them at the wrong-doer's expense and it was not open to the appellants to say the contrary. The ship was carrying out a legitimate voyage to New York across the North Atlantic in bad weather which she would not have encountered but for the collision damage. She was diverted from West Africa and sent to New York for the express purpose of having the repairs done. This is a relevant circumstance. The cause of the dry docking was and remained the collision. The ship, going to New York for permanent repairs, was destined for dry docking and it should make no difference that she encountered heavy weather on the way. "All the cases " in which the owner of the innocent ship fails to recover damages " for detention during collision repairs have one fact in common; " the permanent repair of the collision damage has been postponed " by the owner to suit his own convenience, and some subsequent " supervening event has been the true cause of the detention ": see the Registrar's reasons for his report in the present case (appendix to printed case, pp. 33-4). See also the propositions in the reasons for the Registrar's report in *The Empire Squire* ²¹ (appendix to printed case, pp. 101-2): "(1) Where of two causes " only one makes detention of a ship imperatively necessary, the

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²⁰ 1928 S.L.T. 71, 75; 30 Ll.L.Rep. 32, 35.

²¹ (1946) House of Lords Printed Cases, 1951, cited in the appendix to this case, p. 101.

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“loss of time is attributed to that cause alone, save where the
 “time is increased by the second cause. Hence the principle of
 “‘convenient opportunity.’ . . . (2) It is immaterial whether
 “imperative necessity arises out of contract or tort or other-
 “wise. . . . (3) Where for each of two independent causes it is
 “imperatively necessary that a vessel be detained and the loss
 “of time is not increased by the second cause, the loss of time
 “is attributed solely to the cause first in point of time.” *The*
York ²² is distinguishable from the present case, because there
 the repairs were postponed and it was decided to sell the ship
 unrepaid; in those circumstances it would have been unreason-
 able to allow damages for detention. Here the respondents did
 not take the risk of postponing the repairs (as in *The Glen-*
finlas ²³). The risk of so doing would have been that they might
 be deprived of damages for detention. This was the real ground
 of the decisions in *The Cameronia v. The Hawk* ²⁴ and *The*
Kingsway.²⁵ The respondents in the decision they took were
 acting reasonably in the best interests of all concerned and should
 not be thereby damnified.

The decision of the Court of Appeal is in accordance with
 several decisions in similar cases and is not in conflict with any
 reported case concerning facts comparable in material aspects
 with those of the present case. It has been the practice to follow
The Haversham Grange ²⁶ (which was rightly decided) ever since
 it was determined, and the House of Lords should not disturb
 this long-standing authority. See also the judgment of Gorell
 Barnes P.²⁷ and Roscoe on Measure of Damages in Maritime
 Collisions, 3rd ed., pp. 70-71. *Ruabon Steamship Co. Ltd. v.*
The London Assurance ²⁸ dealt with a question of dock dues and
 not detention. *Vitruvia Steamship Co. Ltd. v. Ropner Shipping*
*Co. Ltd.*²⁹ stands on its own particular facts. The defect in the
 propeller of the *Vitruvia* had existed for a considerable period.
 In any event, that is a Scottish case not binding on the House
 of Lords. [They also referred to *The Acanthus*,³⁰ *Admiralty*
Commissioners v. Valverde (Owners),³¹ and *Admiralty Commis-*
sioners v. Chekiang (Owners).³²]

²² [1929] P. 178.

²³ [1918] P. 363.

²⁴ 1928 S.L.T. 71; 30 Ll.L.Rep. 32. 280.

²⁵ [1918] P. 344.

²⁶ [1905] P. 307.

²⁷ (1905) 10 Asp.M.C. 156, 157.

²⁸ [1900] A.C. 6.

²⁹ 1925 S.C.(H.L.) 1; 21 Ll.L.Rep.

³⁰ [1902] P. 17, 22.

³¹ [1938] A.C. 173, 194.

³² [1926] A.C. 637.

D. A. Scott Cairns K.C. in reply. It is assumed that *The Haversham Grange* ³³ was rightly decided and is applicable where the damage is caused by one tortfeasor and by act of God, and the detention is brought about by two causes: (1) repair of the collision damage, and (2) repair of the heavy-weather damage. To decide in favour of the appellants need not conflict with any decision in England or Scotland, for here no detention is attributable to the collision damage. The present case is exactly covered by what is said at p. 85 of *Roscoe on the Measure of Damages in Maritime Collisions*, 3rd ed. It is within *The Kingsway* ³⁴; *The York* ³⁵; *The Cameronia v. The Hawk* ³⁶; and *Vitruvia Steamship Co. Ltd. v. Ropner Shipping Co. Ltd.* ³⁷ It can be differentiated from *Admiralty Commissioners v. Chekiang (Owners)*. ³⁸ The guiding principle is that laid down in *The Argentino*. ³⁹ See also *The Ikala*. ⁴⁰ The effect of the Court of Appeal's judgment is not *restitutio in integrum* but to put money into the pockets of the respondents.

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Their Lordships took time for consideration.

November 29. VISCOUNT JOWITT [having stated the facts and held that the heavy-weather damage was not in any sense a consequence of the collision and must be treated as a supervening event occurring in the course of a normal voyage, during which the *Heimgar* was on hire, continued]:—My Lords, for the appellants it was contended that as a result of the heavy-weather damage which was subsequent to the collision, the owners of the *Heimgar* had not suffered any damage by reason of her detention, since during the whole time that the collision repairs were being undertaken the ship was undergoing repairs to render her seaworthy, which repairs were necessitated by heavy weather. It was further contended that as the heavy-weather damage was the only damage which rendered the vessel unseaworthy this must be regarded as the effective cause of the detention.

For the respondents it was contended that as the owners of the *Heimgar* were entitled to have permanent repairs effected as a consequence of the collision and had actually and properly decided to send the ship to New York to have these repairs

³³ [1905] P. 307.

³⁴ [1918] P. 344.

³⁵ [1929] P. 178.

³⁶ 1928 S.L.T. 71; 30 Ll.L.Rep. 32.

³⁷ 1923 S.C. 574, 585; 1925 S.C. (H.L.) 1; 21 Ll.L.Rep. 280.

³⁸ [1926] A.C. 637.

³⁹ (1888) 13 P.D. 191.

⁴⁰ [1928] P. 86.

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effected, they had become "necessary," and it was argued that her owners were entitled to claim against the owners of the wrong-doing vessel for damages due to the detention. In support of this contention they relied upon the rule laid down in *The Haversham Grange*.⁴¹

My Lords, at the outset I think it is well to bear in mind the elementary principle that it is for the plaintiff in an action of damages to prove his case to the satisfaction of the court. He has to show affirmatively that damages under any particular head have resulted from the wrongful act of the defendant, before he can recover those damages. This principle applies to maritime collisions as much as it does to collisions on land. Mr. Roscoe, in his book dealing with the Measure of Damages in Maritime Collisions, 3rd ed., at p. 10, cites *Mersey Docks and Harbour Board v. Marpessa (Owners)*⁴² as illustrating the proposition that the plaintiffs "were only entitled to recover damages (by way of demurrage) in respect of such money as the court was reasonably satisfied had been lost." He points out that "the same principle has been laid down in the United States: 'It is equally well settled, however, that demurrage will only be allowed when profits have actually been, or may be reasonably supposed to have been, lost, and the amount of such profits is proven with reasonable certainty': *The Conqueror*"⁴³. Moreover, it is well established that in considering the damages occasioned by a wrongful act all those facts which have actually happened down to the date of the trial must be taken into account. (*The Kingsway*,⁴⁴ per Scrutton L.J.) For this reason it is undoubted that if a collision took place which would have occasioned a time in dock for repairs and the ship is sunk before these repairs can be effected, any claim for loss of time which would have been occupied in such repairs must fail. Scrutton L.J. in *The York*⁴⁵ puts other illustrations showing circumstances which may make it impossible to substantiate a claim for damages for loss of profitable time. A ship may be detained by ice so that she could not trade at all, or possibly by an embargo, and other illustrations can be given.

If I may use the expression of Bucknill L.J.,⁴⁶ who delivered the leading judgment in the Court of Appeal, damages are payable for the detention of a ship because she is "a profit-earning machine." If she ceases to be a profit-earning machine it

⁴¹ [1905] P. 307.

⁴² [1907] A.C. 241.

⁴³ (1896) 166 U.S. 110, 125.

⁴⁴ [1918] P. 344, 362.

⁴⁵ [1929] P. 178, 185.

⁴⁶ [1951] P. 167, 178.

follows that she can sustain no damage from being detained until she again becomes capable of earning profit. In other words, it is not enough to consider whether the ship was detained by the wrongful act of the defendant. It is essential to consider whether damages were caused to the plaintiff by reason of such detention. So considered, it will be seen that the problem is not solved by answering the questions: "Was the ship detained and if so what was the cause of her detention?" It is essential to answer the further question: "Assuming that she was detained and assuming that she was detained by the wrongful act of the defendant, did the plaintiffs sustain damages as a result of that detention?"

In the present case the ship, having had temporary repairs, was in a seaworthy condition when she sailed across the Atlantic. It is no doubt the fact that she was sent on this particular voyage in order that permanent repairs might be carried out. At the same time it must be noted that the owners had not entered into any contract to send her for repairs and would have been free had they been so minded to send her back from New York without repairs being effected. I am willing to assume, without deciding the question, that the collision was a cause of her detention. Still the fact remains that when she entered the dock at New York she was not a profit-earning machine by reason of the heavy-weather damage which had rendered her unseaworthy. If there had been no collision she would have been detained in dock for 30 days to repair this damage. I cannot see that her owners sustained any damages in the nature of demurrage by reason of the fact that for 10 days out of the 30 she was also undergoing repairs in respect of the collision.

Willmer J. considered that the repairs to the engines would not have prejudiced the owners' claim to recover damages for loss of profitable time. He deals with this question as follows⁴⁷: "Although the collision repairs were not immediately necessary, the owners of the *Heimgar* were entitled to have them carried out, and if they did so would be entitled to take advantage of the occasion to carry out such other repairs of their own as they might think fit. The learned Registrar has found, rightly, in my judgment, that the vessel was diverted to New York for the express purpose of undergoing the collision repairs, and it matters not that, as I have found, there was a subsidiary purpose of carrying out a machinery overhaul at the same

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⁴⁷ (1950) 84 Ll.L.Rep. 148, 153.

H. L. (E.) "time. Had there been no subsequent heavy-weather damage
 1951 "necessitating immediate repair, it seems to me that in accord-
 CARSLOGIE "ance with the principles applied by the House of Lords in *The*
 STEAMSHIP " *Chekiang*⁴⁸ the plaintiffs would clearly have been entitled to
 Co. LD. "recover damages in respect of 10 days of the detention, not-
 v. "withstanding the fact that they took advantage of the occasion
 ROYAL "to proceed with their machinery overhaul." My Lords, I am
 NORWEGIAN "in complete agreement with this view.
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It is well established that if a ship goes into dock for repair of damage occasioned by a collision brought about by the fault of another vessel, the owners of that other vessel must pay for the resulting loss of time, even although her owners take advantage of her presence in the dock to do some repairs which, though not necessary, were advisable. Thus, in the case of *Ruabon Steamship Co. Ltd. v. The London Assurance*,⁴⁹ the *Ruabon* suffered damage on the voyage which made it necessary for her to be put into dry dock. The owners (without causing delay or increase of dock expenses) took advantage of her being in dry dock to have the survey of the vessel for renewing her classification made, though this survey was not then due. It was decided that the expenses of getting the vessel into and out of dock as well as those incurred in the use of the dock fell upon the underwriters alone. In *The Acanthus*,⁵⁰ whilst the vessel was in dry dock to repair collision damage for which the defendants were liable, the owners took advantage of the opportunity to fit her with bilge keels. It was decided that, notwithstanding this fact, the wrong-doers were not entitled to any contribution towards the cost of dry docking. In *Admiralty Commissioners v. The Chekiang (Owners)*⁵¹ H.M.S. *Cairo* suffered damage in a collision for which the owners of the *Chekiang* were to blame. After being temporarily repaired, she proceeded to Hongkong for permanent repairs. The Admiralty took advantage of her presence in the dock to undertake her annual refit, though this was not then necessary. It was decided that this fact did not avail the defendants and could not be prayed in aid by them in reduction of their liability. Lord Dunedin points out,⁵² however, that "if the act of the owner was of necessity, it would "be otherwise." These cases support the view that the time occupied in the engine overhaul which, however desirable it may have been, was not then necessary, could not have been used to

⁴⁸ [1926] A.C. 637.

⁴⁹ [1900] A.C. 6.

⁵⁰ [1902] P. 17.

⁵¹ [1926] A.C. 637.

⁵² *Ibid.* 642.

reduce any amount which might have been due from the owners of the wrong-doing vessel by way of damages for detention; but they have no bearing on the effect of the heavy-weather repairs which had made the *Heimgar* unseaworthy.

The case mainly relied on by the respondents as bearing on this latter question was *The Haversham Grange*.⁵³ In that case the *Maureen* had suffered two collisions, for the first of which she was held partly to blame, and for the second of which she was held free of all blame. Each collision made it necessary that she should go into dry dock. The two sets of repairs were carried out together: 22 days were taken in repairing the damage due to the first collision and six days in repairing the damage due to the second collision, these periods being concurrent and not cumulative and successive. The question arose which of the two wrong-doing vessels should pay the undoubted damages which the owners of the *Maureen* had suffered from the delay to their steamship, and a separate question arose as to the dock dues which had been incurred.

With regard to the demurrage, Gorell Barnes P. held that as the *Maureen* had already been incapacitated by the first collision before the second collision took place, the repair of the damage done by the second collision did not in any way delay her, and therefore the second wrong-doer was not responsible for any part of the damages due to delay. He dealt with the dock dues upon the same basis. On appeal, the decision of the President was confirmed with regard to demurrage, but it was decided that the claim for dock dues ought to be dealt with on a different basis, and it was decided that the amount due in respect of dock dues should be divided between the two wrong-doers.

My Lords, I think that there can be no logical distinction between the claim for damages for delay and for dock dues and, believing as I do, that the decision as to damages for delay was correct, it follows in my view that the latter decision in respect of dock dues cannot be supported. I am confirmed in this view by this further consideration. *The Ruabon*⁵⁴ was a case which was concerned solely with dock expenses. No question as to damages for delay arose in that case. *The Chekiang*⁵⁵ was a case which was concerned solely with damages for delay. No question as to dock expenses arose in that case. Yet Lord Dunedin, in the latter case,⁵⁶ regards the decision of the House

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in *The Ruabon*⁵⁷ about dock expenses as concluding the question in *The Chekiang*⁵⁸ about damages for delay. This supports the view that in principle the two questions are indistinguishable.

The case from which I have derived most assistance is *Vitruvia Steamship Co. Ltd. v. Ropner Shipping Co. Ltd.*⁵⁹ The *Vitruvia* had been in collision with the *Carperby*. For this collision the *Carperby* was alone to blame. The damage sustained by the *Vitruvia* did not render her unseaworthy. She continued to make voyages and it was not until several months after the collision that she came to Glasgow to have the collision damage repaired. When the case first came to the House of Lords the appellants put forward an argument founded upon the alleged facts that the *Vitruvia*, before she entered the dock to carry out the collision repairs, was in fact unseaworthy, that the defect rendering her unseaworthy could only be remedied in a dry dock and that no dry dock was available until after the collision damage had been repaired. Accordingly they sought to argue that there had been no damages for delay occasioned by the repair of the collision damage. As this matter had not been properly pleaded and the relevant facts had not been found, the House sent the case back for a further ascertainment of the facts. The further findings established that the *Vitruvia* was in fact unseaworthy owing to a small defect which could have been put right in a few hours; and that it was not necessary to obtain a dry dock to remedy this defect. On these facts Lord Dunedin⁶⁰ was of the opinion that the respondents had not established the defence they sought to make. Had the facts established that the unseaworthiness of the vessel could not have been made good until after the collision repairs had been completed it is plain that he would have decided that the owners of the wrong-doing vessel would not have been liable for any damages for delay whilst the collision repairs were being carried out. Lord Phillimore put the matter in this way⁶¹: "When 'this case was before your Lordships' House on the last 'occasion, a formidable point was made by the appellants. 'They said, 'you must not charge us for the time spent in 'repairing the damage caused by the collision, for you lost 'no time by it, because you had to wait for the dry dock 'into which you could put your ship in order to repair her

⁵⁷ [1900] A.C. 6.⁵⁸ [1926] A.C. 637.⁵⁹ 1925 S.C.(H.L.) 1; 21 Ll.L.Rep. 280.⁶⁰ 1925 S.C.(H.L.) 1, 5; 21 Ll.L.Rep. 280, 282.⁶¹ 1925 S.C.(H.L.) 1, 6; 21 Ll.L.Rep. 280, 282.

“ ‘propeller.’ ” Lord Phillimore adds, however, that this case was not proved, for it was not necessary for the owners of the *Vitruvia* to wait for a dry dock; they would have been able to do the work by tipping the ship in wet dock, and accordingly he decided that the owners of the *Vitruvia* were entitled to be paid for the loss of profitable time during which the repairs were being effected. The case of *The Vitruvia* ⁶² is not referred to in the judgments of the Court of Appeal, though I feel confident that had the judges considered this case and the grounds on which it was decided they would not in the present case have come to the conclusion to which they in fact came.

A similar question arose in *The Cameronia v. The Hawk*.⁶³ In that case the *Cameronia* had sustained damages in a collision for which the *Hawk* was to blame, but her seaworthiness was not affected, and after temporary repairs she continued her trading. Subsequently she sustained sea damage to her rudder which rendered her unseaworthy and necessitated immediate repair. The question arose whether the wrong-doing vessel was responsible for any loss of profitable time occasioned during the time when the collision repairs were being carried out. Lord Constable states his view in the following words ⁶⁴: “ I think it “ would be difficult to affirm that the collision was not a cause “ of the detention, though the detention was immediately brought “ about by the accident to the rudder. But the present question “ does not seem to me to depend upon whether in strictness the “ collision or the accident to the rudder was the true cause of “ the detention. Even on the assumption that the repair of the “ collision damage was the true cause, the pursuers must also “ show that the detention of the *Cameronia* for such repair “ resulted in a loss of profit, and they cannot do so when in fact “ the *Cameronia* was by reason of the accident to the rudder dis- “ abled from earning any profit before she was laid up. The loss “ of profit was not the direct and natural consequence of the “ defenders’ wrongful act, nor did it represent what but for the “ collision the owners would have earned by the use of their “ ship.”

Bucknill L.J., in his judgment, differentiated this case on the ground that if the heavy-weather damage was done after the collision damage the rule laid down in *The Haversham Grange* ⁶⁵

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⁶² 1925 S.C.(H.L.) 1; 21 Ll.L.Rep. 280.

⁶⁴ 1928 S.L.T. 71, 76; 30 Ll.L.Rep. 32, 36.

⁶³ 1928 S.L.T. 71; 30 Ll.L.Rep. 32.

⁶⁵ [1905] P. 307.

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should apply. My Lords, both in *The Hauk*⁶⁶ and in the present case the unseaworthiness was caused by an event which happened after the collision, and I see nothing in the rule laid down in *The Haversham Grange*⁶⁷ which in any way conflicts with the decision in *The Hauk*.⁶⁸ That rule, as I have already pointed out, rightly treats the first wrong-doer who renders the vessel unseaworthy as responsible for the consequent delay, notwithstanding the act of a second wrong-doer who also rendered the ship unseaworthy; but the rule is addressed to causation, for it was clear in *The Haversham Grange*⁶⁷ that damages had resulted from the detention.

In the present case I think that the damage brought about by the collision did not in the events which happened cause any loss of profitable time to the owners of the *Heimgar* because when she entered dry dock she was not a profit-earning machine. This is in substance the ground taken by Willmer J. in his judgment when he says⁶⁹: "The owners of the *Heimgar* would have had "no use of their ship, and would have earned nothing by her "use, for the simple reason that at the time when the collision "repairs were executed the ship was completely immobilized as "the result of damage received in the heavy weather encountered "during the Atlantic voyage." My Lords, I agree with this reasoning and accordingly I am in favour of allowing the appeal and restoring the judgment of Willmer J.

LORD NORMAND. My Lords, when a plaintiff claims damages from a tortfeasor for the detention of a chattel while it is undergoing repairs he undertakes to prove, not only that the repairs were rendered necessary by the tortious act and that the period of detention in respect of which he claims was necessary for the execution of the repairs, but also that by the deprivation of the use of the chattel during the detention he suffered pecuniary loss. If the action is raised and the damages have to be assessed before the repairs are executed, the court is perforce dealing with damages which may or may not arise in the future, and it will require proof of sufficient certainty that the plaintiff will suffer measurable damage, making allowance for the chance that by some subsequent casualty the chattel may be destroyed before the repairs are executed, or that when the chattel comes to be

⁶⁶ 1928 S.L.T. 71; 30 Ll.L.Rep. 32.⁶⁸ 1928 S.L.T. 71; 30 Ll.L.Rep. 32.⁶⁷ [1905] P. 307.⁶⁹ 84 Ll.L.Rep. 148, 155.

repaired the deprivation of its use may involve no pecuniary loss :
The Kingsway.⁷⁰

In the more usual case, when the damages are assessed after the repairs have been executed, the court has before it the facts as they have occurred. It is no longer dealing with the future but with past history, and in the assessment proof of the facts displaces estimates of probabilities. This principle has long been established and has been followed not only in many claims for collision damage but also in a wide variety of other cases in which compensation or damages have been assessed. For example, in *Bullfa and Merthyr Dare Steam Collieries* (1891) *Ld. v. Pontypridd Waterworks Co.*⁷¹ it was applied to a claim for statutory compensation. In *Williamson v. John I. Thornycroft & Co. Ld.*⁷² the Court of Appeal applied it when a widow claiming under Lord Campbell's Act died before the assessment of the damages, and in a recent case this House held that it has been rightly applied by the Court of Session where the pursuer in a claim for solatium died before the solatium was assessed : *Kelly v. Glasgow Corporation*.⁷³

The facts of the present case, which it is unnecessary for me to narrate again in detail, show that the *Heimgar*, while seaworthy and able for a trading voyage after temporary repairs rendered necessary by a collision with the *Carslogie*, suffered weather damage so great that immediate repairs were necessary before she could continue trading. She entered dry dock at New York and there three sets of repairs were carried out, the permanent repairs required to make good the collision damage, the repairs immediately necessary to make good the heavy-weather damage, and repairs to her auxiliary machinery which were not immediately necessary. These repairs were carried out concurrently. The *Heimgar* was detained in dock 50 days in all, but the collision repairs alone would not have detained her for more than 10 days, whereas the repair of the heavy-weather damage alone would have detained her 30 days. On these facts she was, in consequence of the heavy-weather damage, a vessel incapable of gainful use during the 10 days necessary to complete her collision repairs, and no claim against the *Carslogie* for deprivation of profits in respect of this detention can be established.

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⁷⁰ [1918] P. 344.⁷¹ [1903] A.C. 426.⁷² [1940] 2 K.B. 658.⁷³ 1951 S.C.(H.L.) 15; [1951] W.N. 111.

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Every case depends on its own facts, but I find the strongest support for this conclusion in *The Vitruvia*.⁷⁴ The *Vitruvia* suffered damage by collision with the *Carperby* for which the *Carperby* was alone to blame. This damage did not make her unseaworthy or prevent her from trading. After several months of profitable trading her owners brought her to Glasgow solely for the purpose of having the collision repairs carried out. She arrived at Glasgow on August 12 and the repairs were completed on September 3. Her owners claimed against the *Carperby* for loss of earnings during these 22 days. On her voyage to Glasgow it had been noticed that her propeller was making a knocking sound, and after her arrival the engineer reported that he suspected there was something wrong with the propeller. On September 2 a dry dock became available for the first time since her arrival, and she entered it that day for examination of her propeller. It was then found that a nut on the propeller was loose and needed tightening. The repair was completed in a few hours. While this defect existed it would have been imprudent to send the ship to sea. The case came before this House on two occasions. On the first occasion the House allowed parties an opportunity to amend their pleadings so as to present in clear form the defence that the *Vitruvia* was unseaworthy during the whole period in respect of which damages were claimed and accordingly that there was no loss in respect of detention during that period, and the pursuers' reply that the propeller defect would not have prevented her from completing her next voyage because it could have been quickly repaired though no dry dock was available to her. That this House regarded the defence as relevant is clear, for it remitted the case to the Court of Session with a direction to allow the proposed amendments and a proof thereof. As a result of the proof it was found that the propeller defect could have been repaired in a few hours without dry-docking the ship.

When the case was reported to the House, Lord Dunedin said ⁷⁵: "If the defenders had been in a position to say, 'your vessel when it arrived on the 12th was in what is admitted to be a practically unseaworthy condition,' and if they had been able to go on to say, 'it would not have been possible for you to get it into a seaworthy condition before the time when you went into dry dock on September 2,' then they could

⁷⁴ 1925 S.C.(H.L.) 1; 21 Ll.L.Rep. 280.

⁷⁵ 1925 S.C.(H.L.) 1, 5; 21 Ll.L.Rep. 280, 282.

“have added, I think, what always can be said by defenders, “‘you were bound to use that time in executing the repairs.’” “In other words, it would not have been possible for the pursuers to say, ‘we will wait until September 2 when we can “‘put our vessel into dry dock, and then we will do our repairs “‘and charge you for demurrage during the time we are doing “‘them.’” Then his Lordship went on to point out that the defenders could not say that, because the propeller defect could have been remedied and the vessel made seaworthy in a very few hours without the use of a dry dock. That case would have been indistinguishable from the present if dry-docking had been necessary to make good the propeller defect. On that hypothesis the defence would have succeeded. A seaworthy ship had been directed in each case to a repair port. In *The Vitruvia*⁷⁶ the only purpose in sending the ship to Glasgow was the repair of the collision damage; in the present case the repair of the collision damage was one and the chief of three purposes in sending the ship to New York, the other two being to make a voyage on hire and to carry out repairs to the auxiliary engines. In both cases the ships suffered on the voyage damage rendering them unfit for another voyage. In both cases any period of detention necessary for the completion of the repairs to make the ship seaworthy had, if possible, to be used by her owners to execute the collision repairs, and from that detention no claim for loss of profits as part of the collision damage could arise.

*The Hawk*⁷⁷ is also a case closely resembling the present case. The *Hawk* had suffered damage in a collision with the *Cameronia* for which the *Cameronia* was held liable to the extent of two-thirds. As in the present case, some temporary repairs were carried out. Then, after a period of trading, she suffered storm damage which necessitated her being docked at once for repair. The storm damage repairs and the collision damage repairs were put in hand at the same time, but the storm damage took longer to repair than the collision damage. The pursuers claimed a sum in the name of loss of profits during detention. The Lord Ordinary, Lord Constable, disallowed the claim on the ground that though the collision damage might be a cause of the detention during their repair, the pursuers failed to show that the vessel could have earned any profit in that period. The Lord Ordinary regarded this case as governed by *The Vitruvia*,⁷⁸ and

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⁷⁶ 1925 S.C.(H.L.) 1; 21 Ll.L.Rep. 280.

⁷⁷ 1928 S.L.T. 71; 30 Ll.L.Rep. 32.

⁷⁸ 1925 S.C.(H.L.) 1; 21 Ll.L.Rep. 280.

H. L. (E.) 1951 his judgment is a valuable clarification of the law of damages in such cases as this.

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None of the other cases cited conflicts with the decision of Willmer J. in this case, or with *The Vitruvia*⁷⁸ or *The Hawk*.⁷⁹ The decision on demurrage in *The Haversham Grange*⁸⁰ is no exception. It is indeed another example of the general rule that the owner of a chattel who claims damage for detention from a wrong-doer must show that, apart from the wrongful act of the defendant, the chattel was capable of profitable use during the period of detention. In *The Haversham Grange*⁸⁰ the *Maureen* was in collision with the *Caravellas* on December 25 and with the *Haversham Grange* on December 26. The owners of the *Caravellas* agreed to a decree of both to blame, and the owners of the *Haversham Grange* admitted sole liability. Each collision caused damage which it was essentially necessary to repair. The owners of the *Maureen* recovered 50 per cent. of their loss including loss on account of detention from the owners of the *Caravellas*, and sought to charge the owners of the *Haversham Grange* with the remaining half share of demurrage damage. There was also a claim for dock dues, which I pass over in the meantime. One of the proved facts was that the repair of the damage done by the *Haversham Grange* had not increased the period of detention. Sir Gorell Barnes P. held that as the *Maureen* was already incapacitated by the collision with the *Caravellas* when she collided with the *Haversham Grange* the claim against the *Haversham Grange* for loss of earnings during repair failed, and that decision was affirmed by the Court of Appeal. As in that case so in this the claim fell to be disallowed because the plaintiffs failed to prove that the ship could have earned profits during the period of detention caused by the repairs rendered necessary by the defendants' tort. There has been, I think, some misunderstanding of the decision in *The Haversham Grange*.⁸⁰ Thus, in his judgment in *The Hawk*,⁸¹ Lord Constable seems to over-emphasize the importance of the fact that the collision with the *Caravellas* was prior in time to the collision with the *Haversham Grange*. The emphasis should be on the existing disablement of the *Maureen* when the *Haversham Grange* collided with her.

I respectfully think that the Court of Appeal in the present case erred in thinking that the issue could be settled by

⁷⁸ 1925 S.C.(H.L.) 1; 21 Ll.L.Rep. 280.

⁷⁹ 1928 S.L.T. 71; 30 Ll.L.Rep. 32.

⁸⁰ [1905] P. 307.

⁸¹ 1928 S.L.T. 71; 30 Ll.L.Rep. 32.

determining whether there was a causal connexion between the collision damage and the detention of the *Heimgar* for 10 days. This particularly appears in the judgment of Denning L.J. On this point I am in agreement with the Lord Ordinary's judgment in *The Hauk*.⁸¹ It is, I think, difficult to say that the collision damage was not, while it was being made good, a cause of the detention of the ship. But the real issue is whether in these 10 days the vessel was a potential profit-earning vessel or not. Bucknill L.J. thought that the fact that the *Heimgar* was re-routed to New York for the express purpose of having the collision repairs carried out and that it was when she was on this voyage that she suffered the heavy-weather damage, was a material circumstance which distinguished this case from *The Hauk*.⁸¹ So, also, Lloyd-Jacob J.⁸² thought that "the decision to "immobilize" the *Heimgar* for collision repairs was the determining factor. But to make that distinction a ground of judgment is inconsistent with *The Vitruvia*,⁸³ which was unfortunately not referred to in any of the judgments. Bucknill L.J. fell into what I humbly think is the error of supposing that *The Haversham Grange*⁸⁴ is authority for a rule that liability for detention attaches to a tortfeasor merely because the damage done by his tort is prior in time to a subsequent damage, whether caused by a tort or by some other cause. For example, he says⁸⁵: "I think it essential to know whether the heavy-weather "damage was received before or after the damage by collision." But, with respect, if the fact is that one of two casualties made the vessel unseaworthy and the other did not, the problem of liability is solved and the time sequence is irrelevant. In *The Haversham Grange*⁸⁶ the time sequence was important because the damage suffered by the *Maureen* in each of the two collisions was enough to make her unseaworthy.

On the view of the case which I have taken it is not necessary to consider the bearing of the repairs to the auxiliary engines, which occupied 50 days, on the claim for damages for detention. But I may be allowed to say that I agree with all that has been said on that point by my noble and learned friend on the woolsack.

For the reasons I have given I would allow the appeal.

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⁸¹ 1928 S.L.T. 71; 30 Ll.L.Rep. 32.⁸² [1951] P. 167, 183-4.⁸³ 1925 S.C.(H.L.) 1; 21 Ll.L.Rep.⁸⁴ [1905] P. 307.⁸⁵ [1951] P. 167, 173.⁸⁶ [1905] P. 307.

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My Lords, in this appeal the liability for dock dues is not in issue. We were told that they had been apportioned, and there was no appeal against that. This is in accordance with the decision of the Court of Appeal in *The Haversham Grange*,⁸⁶ reversing Gorell Barnes P. In my opinion the liability for dock dues is the same as the liability for the demurrage, and the decision in *The Haversham Grange*⁸⁶ on this point is inconsistent with principle and with a decision of this House. The history of the matter must be shortly set out. In *The Ruabon*⁸⁷ a vessel was damaged by a peril insured against and was put into dry dock for the necessary repairs. The survey of the vessel for renewing her classification was not due at that time, but the owners took advantage of her being in dry dock to have the survey made without increasing the period of detention. It was held that the liability for the dock dues fell upon the underwriters alone. It will be observed that that was a case in which the liabilities of the parties inter se rested upon contract. But in *The Acanthus*⁸⁸ the question of liability, both for dock dues and for demurrage, between the plaintiff and a tortfeasor was decided by Sir Francis Jeune by applying the rule laid down in *The Ruabon*.⁸⁹ The facts were that when the vessel was in dry dock for the repair of collision damage the owners took advantage of the opportunity to fit bilge keels without causing increased detention or increase of dock dues. It was held by Jeune P. that the tortfeasor was liable for the dock dues and for the demurrage, and he made no distinction between them. The next case was *The Haversham Grange*,⁹⁰ which, as I have already indicated, made a radical distinction between liability for dock dues and liability for demurrage. The last case to which I need refer is *The Chekiang*.⁹¹ In that case the Admiralty took the opportunity of the docking of H.M.S. *Cairo* for collision repairs to do certain refitment repairs not immediately necessary. It was held that the owners of the vessel to blame for the collision were liable in damage for the deprivation of the use of the vessel for the period of the collision repairs. Lord Dunedin, in his speech, said that the question was concluded by *The Ruabon*,⁹² and he also approved of the decision in *The Acanthus*.⁹³ Lord Phillimore took the same view of the case, and said that the decision upon

⁸⁶ [1905] P. 307.

⁸⁷ [1900] A.C. 6.

⁸⁸ [1902] P. 17.

⁸⁹ [1900] A.C. 6.

⁹⁰ [1905] P. 307.

⁹¹ [1926] A.C. 637.

⁹² [1900] A.C. 6.

⁹³ [1902] P. 17.

dock dues in *The Haversham Grange*⁹⁴ might have to be reconsidered. *The Haversham Grange*⁹⁴ decision is not consistent with the ratio decidendi of *The Acanthus*⁹⁵ and *The Chekiang*.⁹⁶

I want only to add that I think that the distinction between liability for dock dues and liability for detention is in principle unmaintainable. The present case may be taken as an illustration. As regards detention, the question is whether the owners of the detained ship suffered a loss of earnings while she was undergoing the collision repairs. The answer is that they did not, because during the detention the ship, though not disabled from trading by the collision damage, was necessarily disabled from trading by the weather damage. As regards the dock dues, the question is whether any part of the payment of the dues for the period while the collision repairs were executed was a loss suffered as part of the collision damages. The answer is that it was not, because it was a payment incurred in order to carry out the immediately necessary weather damage repairs. The collision repairs were therefore executed in the dock when its use was franked by that necessary payment.

LORD MORTON OF HENRYTON. My Lords, the *Heimgar* was detained in New York for nearly 50 days. At an early stage in the speech of counsel for the appellants, I asked whether it was common ground between the parties that, if the collision between the *Heimgar* and the *Carslogie* had never happened, the *Heimgar* would have been detained in New York for the same period of 50 days. The answer was in the affirmative. In *The Argentino*⁹⁷ Bowen L.J. observed: "A ship is a thing by the use of which "money may be ordinarily earned, and the only question in case "of a collision seems to me to be, what is the use which the "shipowner would, but for the accident, have had of his ship, "and what (excluding the element of uncertain and speculative "and special profits) the shipowner, but for the accident, would "have earned by the use of her?" Willmer J. asked himself that question in the present case and gave this answer⁹⁸: "The "owners of the *Heimgar* would have had no use of their ship, "and would have earned nothing by her use, for the simple "reason that at the time when the collision repairs were executed "the ship was completely immobilized as the result of damage

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⁹⁴ [1905] P. 307.⁹⁵ [1902] P. 17.⁹⁶ [1926] A.C. 637.⁹⁷ 13 P.D. 191, 201.⁹⁸ 84 Ll.L.Rep. 148, 155.

H. L. (E.) "received in the heavy weather encountered during the Atlantic
1951 "voyage."

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My Lords, I agree with this answer, and if it is the correct answer I can see no ground upon which the respondents can recover the damages which they claim for the detention of their ship. If the *Heimgar* had not encountered heavy weather on her voyage across the Atlantic, I entertain no doubt that the respondents could have recovered damages for her detention in New York for the period of 10 days which would have been required to repair the collision damage. In that event they would have lost the use of their profit-earning chattel for a period of 10 days and the negligence of the appellants would have been the cause of that loss; but in the events which happened the respondents have failed to prove that any loss of the use of their profit-earning chattel resulted from the negligence of the appellants. On this short ground I would allow the appeal, but as we are differing from a unanimous judgment of the Court of Appeal, and as Mr. Carpmael submitted that a decision in favour of the appellants would involve overruling *The Haversham Grange*,⁹⁹ I shall first make some observations on that case and shall then explain briefly why I cannot accept the reasoning of the Court of Appeal. I shall follow the example of Bucknill L.J. in quoting Willmer J.'s statement of the facts in *The Haversham Grange*.⁹⁹ It is as follows¹: "In *The Haversham Grange*² . . . the plaintiffs' steamship *Maureen* was involved in two collisions, both necessitating immediate repairs. Both sets of repairs were executed simultaneously, and the repair of the second collision damage did not in any way increase the period of detention which would in any case have been required for the repair of the first collision damages. In respect of the first collision the plaintiffs' ship and the colliding ship, the steamship *Caravellas*, were equally to blame. In respect of the second collision the owners of the colliding ship, the *Haversham Grange*, admitted liability. The plaintiffs in due course recovered from the owners of the first colliding ship 50 per cent. of their claim, including 50 per cent. of the amount lost by reason of the detention of their vessel during repair. They then sought to recover from the owners of the *Haversham Grange* (inter alia) the remaining 50 per cent. of their claim in respect of the detention of their vessel. The learned President, Sir Gorell

⁹⁹ [1905] P. 307.

² [1905] P. 307.

¹ 84 Ll.L.Rep. 148, 154.

" Barnes, confirming the report of the Registrar, disallowed the claim, holding ³ that, 'as the vessel was already incapacitated by something which had previously happened before the second wrong-doing ship ran into her, the repair of the damage done by the second collision did not in any way delay her, and therefore the second wrong-doer was not responsible for any part of the delay, which he had not in fact caused.' In the Court of Appeal the claim for detention was abandoned, but the learned Master of the Rolls, although the matter was no longer before the court, expressed his concurrence with the decision in the court below." Thus the decision in *The Haversham Grange* ⁴ was that the owners of the *Maureen* could not recover from the owners of the *Haversham Grange* any part of the loss resulting from the detention of the *Maureen* during repairs, because no part of that loss resulted from the negligence of that particular wrong-doer. That decision seems to me to be wholly in accordance with the view which I have formed in the present case.

My Lords, I have noticed references in the judgments under appeal ⁵ and in other cases to "the rule laid down in *The Haversham Grange*." ⁶ I confess that I can discover no rule which is laid down in that case. It seems to me merely an illustration of the elementary principle, already stated by my noble and learned friend on the woolsack, that a plaintiff must "show affirmatively that damages under any particular head have resulted from the wrongful act of the defendant before he can recover those damages." I add that, in agreement with the opinions which have just been delivered, I can see no logical reason for the distinction which was drawn in *The Haversham Grange* ⁶ between the claim for damages for detention and the claim for dock dues.

I think that the reason why I differ from the Court of Appeal can best be explained if I quote three sentences from the judgment of Bucknill L.J., whose wide knowledge of these matters leads me to differ from him with great hesitation. The learned Lord Justice said ⁷: "When the owners, quite properly, arranged to have their ship sent to the United States of America in order that the collision repairs might be done, I think that the owners of the wrong-doing ship became liable to pay, not only for the prospective cost of the repairs, but also for the loss of

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of Henryton.³ [1905] P. 307, 309.⁴ Ibid. 307.⁵ [1951] P. 167, 172, 173.⁶ [1905] P. 307.⁷ [1951] P. 167, 173-4.

H. L. (E.) “time thereby incurred. It is true that, if the *Heimgar* had been
 1951 “sunk on her way to the United States, the owners of the wrong-
 CARSLÖGIE “doing ship would not have been liable to pay for detention
 STEAMSHIP “during the repairs. But the reason for that, as explained in
 Co. LD. “*The Glenfinlas*,⁸ is that the ship, having been lost, ceased to be
 v. “a potential money-making machine, and therefore her owners
 ROYAL “did not lose something which did not exist.” With the first
 NORWEGIAN of these three sentences I entirely agree, but I would add that
 GOVERNMENT. in my view no loss of time was “thereby incurred,” because in
 Lord Morton the events which happened the repairs were carried out at a
 of Henryton. time when the ship was incapacitated for other reasons. As to
 the third sentence, I would respectfully point out that in the
 present case the ship ceased to be a potential money-making
 machine when she became unseaworthy owing to heavy weather,
 having been seaworthy when she sailed—see the Lloyd’s sur-
 veyor’s certificate of seaworthiness dated December 4, 1941. In
 these circumstances I find it difficult to distinguish between the
 present case and the position if the *Heimgar* had been sunk on
 her way to the United States. In both cases no loss of time
 would result from the earlier collision.

I agree that this appeal should be allowed with costs.

LORD TUCKER. My Lords, as I have arrived at a conclusion different from that of the Court of Appeal I will state very shortly why I have found myself compelled to disagree with their decision. The gist of Bucknill L.J.’s judgment is to be found where he states⁹ that the fundamental difference between the present case and *The Hawk*¹⁰ is that in the latter case “the ship was compelled to repair her rudder, and was therefore not a profit-earning machine until that repair had been effected.” In that condition the collision repairs were also done, and therefore it was right to say that she would have earned nothing whilst those collision repairs were being done. Whereas in the present case the *Heimgar* was proceeding to New York for the express purpose of having collision damage repaired when she suffered the heavy-weather damage, and it would be contrary to the decision in *The Haversham Grange*¹¹ to hold that she could not in any event have earned a profit during the period of detention by reason of the heavy-weather damage. But, my Lords, both the *Hawk* and the *Heimgar* were rendered unseaworthy by

⁸ [1918] P. 363n.

⁹ [1951] P. 167, 178.

¹⁰ 1928 S.L.T. 71; 30 Ll.L.Rep. 32.

¹¹ [1905] P. 307.

events which happened after the collision in each case. So far as the claim for demurrage was concerned in *The Haversham Grange*,¹¹ it was rejected not because the collision between the *Maureen* and the *Haversham Grange* was subsequent to the collision with the *Caravellas*, but because it turned out that the *Maureen* must have been and in point of fact was detained the whole time in dock for the repairs which had to be executed in consequence of the damage done by the *Caravellas* which had rendered her unseaworthy. It was immaterial that the damage done by the *Haversham Grange* would also by itself have made the *Maureen* unseaworthy or that it occurred after the first collision.

It seems to me, therefore, with respect, that the decision of Willmer J. in the present case was consistent not only with that part of the decision in *The Haversham Grange* ¹¹ which dealt with the claim for demurrage but with the other authorities, including in particular *The Vitruvia* ¹² and *The Hawk*.¹³ I agree, however, with your Lordships in thinking that the other part of the decision of the Court of Appeal in *The Haversham Grange*,¹⁴ viz., with regard to dock dues (which is quite immaterial for present purposes) cannot be reconciled with their decision as to demurrage and should be overruled. Denning L.J. approached the case from the point of view of the common law, but I venture to think that the error underlying his judgment, if I may respectfully say so, is that he regards the cause of the detention as equivalent to the cause of the loss of profit. The distinction is to be found clearly expressed in the judgment of Lord Constable in *The Hawk* ¹⁵ in the passage which has already been quoted. I am prepared to assume in the present case that the collision was a cause of the detention, but none the less the detention for repair did not result in any loss of profit. It does not represent what but for the collision the owners would have earned by the use of their ship.

Lloyd-Jacob J. treated the time of the decision to immobilize as the decisive factor, and this also entered into the reasoning of Bucknill L.J. I do not, however, think that this is consistent with the authorities in which the unseaworthiness of the vessel at the material time has always been regarded as decisive.

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¹¹ [1905] P. 307.¹² 1925 S.C.(H.L.) 1; 21 Ll.L.Rep. 280.¹³ 1928 S.L.T. 71; 30 Ll.L.Rep. 32.¹⁴ [1905] P. 307.¹⁵ 1928 S.L.T. 71; 30 Ll.L.Rep. 32.

H. L. (E.) For these reasons and for those which have been stated by your Lordships I agree that this appeal should be allowed.

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My noble and learned friend, Lord Asquith of Bishopstone, who is unable to be present, has asked me to say that he agrees with the motion proposed from the woolsack.

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Appeal allowed.

Solicitors: *Clyde & Co.; Bentleys, Stokes & Lowless.*

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April 22. ABUBAKAR TUNKU ARIS BENDAHAR AND
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ON APPEAL FROM THE COURT OF APPEAL OF THE
COLONY OF SINGAPORE.

International Law—Foreign sovereign—Immunity from process—No absolute and universal rule—Waiver—Submission to jurisdiction—Japanese Judgments and Civil Proceedings Ordinance, 1946 (Singapore Ordinance No. 37 of 1946), s. 3.

By section 3 of the Japanese Judgments and Civil Proceedings Ordinance, 1946, of Singapore: “(1) Any party to the proceedings “in which a Japanese decree was made or given or any person “aggrieved by such decree may . . . apply in the prescribed manner “to the appropriate court for an order—(a) that such decree be “set aside either wholly or in part; or (b) that the applicant be “at liberty to appeal against such decree.”

The appellant, the Sultan of Johore, in proceedings instituted by him before a Japanese court during the occupation of Singapore by the Japanese, obtained from that court in June, 1945, a judgment to the effect that he was the sole beneficial owner of certain land in Singapore. After the Japanese occupation had ended the respondent, the appellant's son, together with others, took out an originating summons under the Japanese Judgments and Civil Proceedings Ordinance, 1946, claiming that they were persons aggrieved by the Japanese decree of June, 1945, and applying to set it aside, or alternatively asking for liberty to appeal against it. The appellant thereupon sought to have the originating

* *Present:* VISCOUNT SIMON, LORD PORTER, LORD OAKSEY, LORD RADCLIFFE and SIR ALFRED BUCKNILL.

summons set aside and all further proceedings under it stayed on the ground that he was an independent foreign sovereign over whom the court had no jurisdiction:—

Held, first, that in the light of a letter of February 1, 1951, from the Secretary of State to the Rulers of the Malay States, of whom the appellant was one, in which it was categorically asserted that "His Majesty's Government regard Your Highnesses as "independent sovereigns in so far as your relations with His "Majesty are concerned," which letter was tendered to the Board, without objection from the respondents, as containing the necessary and conclusive information from the proper quarter, and accepted by the Board who took judicial notice of the fact so certified, the appellant was at the relevant time an independent sovereign entitled to the immunities in respect of litigation which attached to that status:—

Held, secondly, however, that section 3 of the Ordinance of 1946 authorized an application in the nature of an appeal from the Japanese decree; that the procedure authorized was essentially a continuation of the proceedings already instituted and not a new and distinct proceeding; and that the appellant had been made respondent to the originating summons which was in substance an appeal in proceedings which, by force of the Ordinance of 1946, were a continuance of the very proceedings which he had himself instituted, and accordingly he must be treated as having submitted to the jurisdiction in the respondents' current proceedings and to have therefore waived his immunity.

Duff Development Co. Ltd. v. Kelantan Government [1924] A.C. 797 considered.

There has not been finally established in England (or in Singapore, where the rules applicable are the same) any absolute and universal rule that a foreign independent sovereign cannot be impleaded in the courts in any circumstances.

The Parlement Belge (1880) 5 P.D. 197, *The Cristina* [1938] A.C. 485 and *Larivière v. Morgan* (1872) L.R. 7 Ch. 550; 7 H.L. 423 considered.

Order of the Court of Appeal of Singapore affirmed.

APPEAL (No. 45 of 1950) from an order of the Court of Appeal of Singapore (November 1, 1949) affirming an order of the High Court of Singapore (April 7, 1949).

By an originating summons taken out by the respondents, the son of the appellant, the Sultan of Johore, and others under the Japanese Judgments and Civil Proceedings Ordinance, 1946, on April 14, 1947, the respondents applied to the High Court of Singapore for leave to appeal against, or to set aside, a decree of a Japanese court, dated June 18, 1945, which had been made in proceedings instituted by the appellant, the Sultan, in May, 1945, when the Japanese were in occupation of Singapore. The effect of the Japanese decree was that the Sultan had been held to be

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Section 3 of the Japanese Judgments and Civil Proceedings Ordinance, 1946, provided that: "Any party to the proceedings in which a Japanese decree was made or given or any person aggrieved by such decree may . . . apply in the prescribed manner to the appropriate court for an order—(a) that such decree be set aside either wholly or in part; or (b) that the applicant be at liberty to appeal against such decree."

The Sultan thereupon issued a summons asking that the respondents' originating summons might be set aside and all further proceedings under it stayed on the ground that he was an independent foreign sovereign over whom the court had no jurisdiction.

The High Court (Gordon Smith J.) dismissed the Sultan's summons. He held that at the material time the Sultan was a sovereign ruler, but that he had waived his immunity by issuing the originating summons in the Japanese court during the occupation. He held that the proceedings now sought to be stayed were not new proceedings, but were a continuation of the earlier proceedings in which the appellant had for the time being succeeded.

An appeal by the Sultan to the Court of Appeal of Singapore (Murray-Aynsley C.J. of Singapore; Willan C.J. of the Federation of Malaya, and Evans J.) was dismissed.

The Sultan now appealed.

The facts and the material statutory provisions are stated more fully in the judgment.

1952. January 14, 15, 16, 17, 21, 22, 23 and 24. *C. P. Harvey Q.C., Megaw and E. Lauterpacht* for the appellant. There are three main points. First, aye or no, is the Sultan of Johore a foreign sovereign and recognized as such by His Majesty's Government? Since this appeal was lodged a communication has been made by His Majesty's Secretary of State for the Colonies which, it is submitted, puts beyond doubt the sovereignty of the Sultan of Johore. Secondly, assuming that the Sultan is an independent foreign sovereign, has he waived his immunity? Thirdly, assuming that he is a foreign sovereign entitled to immunity as such, and assuming further that he has not waived the immunity to which he is entitled, does the doctrine of immunity from process of foreign sovereigns recognized as such apply at all in a case where the proceedings are connected

with real property situate within the jurisdiction of the court? On the first question, a letter of February 1, 1951, from the Secretary of State to the Rulers of the Malay States said that: "His Majesty's Government regard Your Highnesses as independent sovereigns in so far as your relations with His Majesty are concerned." It is submitted that that certificate, though not issued to this Board in response to a request from the Board, and, indeed, not issued in response to a request from any court, is nevertheless a sufficient piece of information; it is sufficiently formal and public and sufficiently authentic for this Board to found judicial notice on it of the status of the Sultan of Johore. There is authority to show that it is not necessary that the information should be given directly to the court so long as it emanates from His Majesty's Secretary of State.

Sir Lionel Heald A.-G. and *Gahan* as amici curiae. The letter of February 1, 1951, does in fact contain the best information that the Secretary of State can give, and information which will enable the Board to come to a conclusion on the matter. The question is whether the Sultan is or is not an independent sovereign and so capable of claiming immunity under the application of international law to the domestic forum. It was said in *Duff Development Co. Ltd. v. Kelantan Government*¹ that: "It has for some time been the practice of our courts, when such a question is raised, to take judicial notice of the sovereignty of a State, and for that purpose (in any case of necessity) to seek information from a Secretary of State; and when information is so obtained the court does not permit it to be questioned by the parties." It is not necessary for the communication to be addressed to the court itself; there are cases in which letters have been written to the solicitors of the parties: see the *Duff Development Co.* case² and also *Aksionairnoye Obschestvo A. M. Luther v. James Sagor & Co.*³ I cannot answer this question otherwise than in the sense in which it is stated in the *Duff Development Co.* case.⁴ There appears to be no distinction between the position arising on this letter of February 1, 1951, and that which arose in the *Duff Development Co.* case.⁴

It is agreed that in 1945 the Sultan was an independent sovereign in every sense of the word, subject to the fact that he was under the domination of the Japanese. Next came the suggested Malay Union, which did not go through. Then the

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Federation of Malaya was formed. That state of affairs gave rise to a complicated legal situation. The view was taken that had the Union gone through it might very well have destroyed the Sultan's sovereignty. According to the view which has been expressed the Federation did not have the effect of abrogating his sovereignty. So, whatever the difficulties at any earlier stage, it is now clear that the Sultan of Johore is an independent sovereign.

B. MacKenna Q.C. (for the respondents): I accept the letter of February 1, 1951, as recognition of the sovereignty of the Sultan at that time. The process issued by the respondents, however, was served in 1947. The letter of February 1 should be read as recognition of the position created as from February, 1948. I do not wish to abandon the point that the relevant date may be that when the process was served.

C. P. Harvey Q.C. In substance this litigation arose out of a domestic dispute between the Sultan and his son, as to which of them is entitled to receive the rents and profits of certain plots of land in Singapore. In form it is something quite different—in form it is an originating summons brought by the respondents on April 14, 1947, under the Japanese Judgments and Civil Proceedings Ordinance, No. 37 of 1946, for leave to appeal against, or to set aside, a decree of a Japanese court of June 18, 1945, which had been made in proceedings instituted by the Sultan in 1945, and by which he was held to be the sole beneficial owner of the property in question. The Sultan thereupon applied to have the respondents' originating summons set aside and all proceedings thereunder stayed on the ground that he was an independent foreign sovereign. It is submitted that at all times when the courts below gave their respective judgments the Sultan was an independent sovereign, whether or not he was so at the time when he entered his conditional appearance to the originating summons on October 8, 1947.

Secondly, he has not waived his immunity. Willan C.J., in the Court of Appeal, said that by their originating summons the respondents "were disputing about the very matter—nothing more and nothing less—about which the Sultan himself instituted proceedings in the Japanese court. In my view that is the crux of this case as regards the question of waiver. . . . I hold that the application . . . under section 3 of the Japanese Judgments and Civil Proceedings Ordinance, 1946, is not a new proceeding, but is a continuation of the very same proceedings which the Sultan instituted in the Japanese court." That

view, it is submitted, was completely wrong. Reliance is strongly placed on the *Duff Development* case,⁴ and the present is an a fortiori case. It is difficult to see how the existence of the Sultan's previous application to the foreign court—the Japanese court—can be regarded as a submission to the Singapore court having regard to the *Duff Development* case.⁴ The Sultan has not consented to be impleaded nor has he submitted to the jurisdiction of His Majesty's courts in respect of the proceedings out of which this appeal arises, nor has he in any manner or at any time waived his right to claim sovereign immunity in respect of these proceedings.

[At the suggestion of the Board the third question—whether foreign sovereign immunity extends to proceedings relating to real property situate within the jurisdiction—was left to be dealt with first by counsel for the respondents.]

B. MacKenna Q.C. and *Ian C. Baillieu* for the respondents. The submissions for the respondents are made first on these assumptions: that the High Court of the Colony of Singapore was a different court from that which heard and determined the Sultan's claim in 1945; that the Japanese Custodian did not represent the present respondents in 1945; and that the respondent trustees could not be considered as appellants under section 3 of the Japanese Judgments and Civil Proceedings Ordinance, 1946, but only as persons given a right to have a judgment set aside.

The first submission, by way of a general proposition, is that by commencing proceedings in Singapore in 1945 the Sultan consented to his claim in those proceedings being dealt with in all respects as if he were a private litigant. There is no authority against that proposition, and there are some indications that it is supported by authority. And if a judgment obtained in such proceedings by any private litigant would be defeasible either by appeal or by some other revisionary procedure, then judgment obtained by a ruler was equally defeasible. If the law is changed after a foreign ruler begins to sue, and if the altered law would be applicable to a suit brought by a private litigant in the same circumstances, then the foreign ruler cannot claim that the altered law is not applicable to his suit. When the Sultan began proceedings his consent is not to be limited to the decision of the court of first instance, but extends to the revisionary jurisdiction

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of a court established after the Japanese occupation had ended—it is a consent to be dealt with by any court which then had jurisdiction or which might thereafter acquire jurisdiction under the laws of that territory. It is not unreasonable to take the Sultan as consenting in advance to the correction of any judgment which he might obtain in the proceedings which he began; there is something shocking in the contrary view, and unless the Board are driven to it by authority they should not so hold.

Where anybody, whether sovereign, crown prince, private individual or corporation, commences a suit in Singapore he is consenting to the jurisdiction of the Singapore courts in relation to that suit. That is a general rule. When he acts as a plaintiff he submits freely to the jurisdiction. It cannot make any difference that the claimant has under section 3 of the Ordinance of 1946 to go to the court and get leave to appeal. That section gives revisionary powers in respect of Japanese judgments to the re-established courts: it is the duty of the Court of Appeal to decide whether the judgment of the court of first instance (the Japanese court) is a good one and ought to be allowed to stand. The Sultan must be taken as having consented to any change of the laws from time to time that were or could be put into force in relation to his suit. Alternatively, it is submitted that here is an ordinance passed in Singapore governing all cases of Japanese judgments and decrees, no exception being made in respect of persons in the position of the sovereign of Johore, and its terms must therefore be applied to his case just as to any other.

The passages in the cases which, it is submitted, support the proposition that a sovereign who commences proceedings is consenting to be treated as an ordinary litigant are: *King of Spain v. Hullet and Widder*⁵; *South African Republic v. La Compagnie Franco-Belge du Chemin de Fer du Nord*,⁶ where it was said: "I treat this as an action by a foreign Government which submits to the jurisdiction of the court as regards all matters properly appertaining to the action so brought"; *United States v. National City Bank of New York*,⁷ which is also in the Annual Digest and Reports of Public International Law Cases, 1935-37, pp. 218, 220; *Duff Development Co. v. Kelantan Government*⁸—it was said for the appellant here that the position in the *Kelantan* case and this case was really the same, because leave was needed

⁵ (1833) 1 Cl. & F. 333, 352-3.⁶ [1897] 2 Ch. 487, 492.⁷ (1936) 83 Fed.R. (2nd series) 236.⁸ [1924] A.C. 797, 817.

in each case and therefore it followed that there were new proceedings in which the sovereign could not be said to have consented to the jurisdiction. That, it is submitted, does not follow at all. "Occupation [of the territory of a State] does not displace or transfer sovereignty": McNair, *Legal Effects of War*, 2nd ed., p. 320. For the effect of a submission to the jurisdiction in Singapore made at a time when the English King was still the sovereign of Singapore, though temporarily ousted, see Oppenheim's *International Law (Lauterpacht)*, 6th ed., vol. 2, pp. 348-9, para. 172.

With regard to permitting "aggrieved" persons to appeal, see *The Annual Practice*, 1951 ed., p. 1244, order 58, rule 1: "What persons may appeal," and order 27, rule 15 (notes): "Application by person not a party." Those are cited to meet the suggestion for the appellant that there was a new proceeding.

To turn to the second branch of the argument, which relates to the question of immunity from process in respect of land within the jurisdiction, it will be seen that there is almost complete unanimity on this point by textbook writers in this country and in other countries, and to a very large extent in the judgments of authorities. They do recognize that suits respecting title to land stand in a peculiar position, and form an exception to the general rule about sovereign immunity. Much of the authority is that of foreign writers and foreign courts, and it is submitted that that is a strong reason why our courts also should refuse to recognize that the general rule of immunity applies also in the case of real property. Referring first to the textbooks, it is stated in *Westlake's Private International Law*, 7th ed., p. 267, para. 189, that: "But the exception of ex-territoriality does not extend to the forum rei sitae, for no country can be expected to renounce the determination of the property in its soil." That and similar passages in the 5th and 6th editions of *Westlake* all recognize that disputes about the title to land stand on a different footing from other disputes and are outside the immunity. *Oppenheim's International Law*, 6th ed., vol. 1, p. 239, para. 115a (note 4), states: "But there is probably no immunity when the State is sued as owner of real property"; and *Hall's International Law*, 7th ed., p. 181, para. 49, says that "when a sovereign holds property in a foreign country, which clearly belongs to him as a private individual, the courts of the State may take cognizance of all questions relating to the property, and the property itself is affected by the result of the proceedings taken in them." And the footnote says that: "It

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"is considered by some writers that real property held by a sovereign in a foreign country as a private individual is alone subject to the local jurisdiction, and that personal property is exempt." And at p. 184 of Hall: "The immunities from civil jurisdiction possessed by a diplomatic agent, though up to a certain point they are open to no question, are not altogether ascertained with thorough clearness." Hall says that he thinks that it would be better if the rule applied to personal as well as to real property: his clear view is that real property stands outside the immunity, and he is in line with Westlake. See also Foote's *Private International Law*, 5th ed. (1925), pp. 198-9.

With regard to the authorities, it was said in *The Charkieh*⁹ that "the exemption from suit is admitted not to apply to immovable property." And in *Magdalena Steam Navigation Co. v. Martin*,¹⁰ quoting from paragraph 180 of Phillimore's *Commentaries upon International Law*, vol. 2, Pt. VI, chap. 8, it was said that the exemption "has not yet been, and probably never will be, extended to real property, if an ambassador should happen to possess any in the country of his mission." And much to the same effect is said in Wheaton's *Elements of International Law*, Pt. III, chap. 1, para. 18: "The personal effects . . . are entirely exempt from the local jurisdiction; so also of his dwelling-house; but any other real property, or immovables, of which he may be possessed within the foreign territory, is subject to its laws and jurisdiction." One finds throughout the judgment in *The Parlement Belge*¹¹ that Brett L.J. talks about "movable property"; he makes that distinction clear throughout. *The Cristina*¹² is used chiefly to show that to found the immunity it must be established that the immunity was one universally recognized by foreign countries: *per* Lord Maugham¹³; but in that case Lord Thankerton said that: "I have some doubt whether the proposition that the foreign sovereign State cannot be impleaded is an absolute one; the real criterion being the nature of the remedy sought."¹⁴ [Reference was also made to *Republic of Mexico v. Hoffman*,¹⁵ and to *The American Journal of International Law*, 1928, vol. 22, p. 566, which contains an article by Prof. Fairman on "Some Disputed Applications of the Principle of State Immunity" and which deals with the question "where the State is sued as owner of real property"; to

⁹ (1873) L.R. 4 Ad. & Ecc. 59, 97.¹³ *Ibid.* 518.¹⁰ (1859) 2 El. & El. 94, 99.¹⁴ *Ibid.* 494.¹¹ (1880) 5 P.D. 197, 204, 214.¹⁵ (1945) 324 U.S. 30.¹² [1938] A.C. 485.

an article by Prof. Walton on "State Immunity in the Laws of England, France, Italy and Belgium," in the *Journal of Comparative Legislation*, 3rd series, vol. 2, pp. 252, 255; to Dalloz, *Jurisprudence Generale* (1849), pp. 1, 7, 8—there appears to be nothing in the French books inconsistent with that; to *Revue Generale de Droit International Public* (1895), vol. 2, p. 396 (article by Prof. Audinet); to *Journal du Droit International Privé* (1895), vol. 22, pp. 31, 34, 37 (article by P. de Paepe); and to *Revue du Droit International*, 3rd series, vol. 3, pp. 301, 318 (article by Prof. Visscher).] The two last cited articles are by Belgians.

The German authorities are *Journal du Droit International Privé* (1907), vol. 34, pp. 161, 168, and *Von Hellfeld v. Russian Government*, which appears in *The American Journal of International Law* (1910), vol. 5, p. 490, and which, at p. 516, says that: "It is true that by the law of nations there are exceptions "to the extritoriality of States, in such cases as proceedings "affecting real property, and of a voluntary submission to the "foreign jurisdiction." *Gustav Salling v. United States Shipping Board*, referred to in the *Revue Internationale du Droit Maritime* (1922), vol. 33, pp. 868-9, merely reaffirms what was said in the *Von Hellfeld* case (*supra*). See also the article by Prof. L. Von Bar in the *Journal du Droit International Privé* (1885), vol. 12, pp. 645-6. As regards Italy, there is a decision of the *Tribunal Civil de Rome*, reported in the *Journal du Droit International (Clunet)* (1924), vol. 52, p. 1113, and also the case of *Little v. Riccio and Fischer*, in the *Annual Digest and Reports of Public International Law Cases*, 1933-34, p. 177; see also the article by Prof. Gabba in *The Journal of Private International Law* (1890), vol. 17, pp. 27, 39. And lastly, as regards Russia, the position is dealt with by Prof. Allen in the "Position of "Foreign States before National Courts," 1933 ed., p. 293.

By his summons the Sultan asked for two things—to set aside all proceedings and to stay further proceedings. It is submitted that the first part of that on no view of the matter can be acceded to, because the service was perfectly proper at the time—1947—when it was made, when he was not an independent sovereign. There is no certificate from the Secretary of State saying that in 1947 the Sultan was an independent sovereign entitled to immunity. The only clear statement is the 1951 certificate. If my arguments about waiver and real property be wrong, still the right order would have been to stay further proceedings on the originating summons, and not to set aside the service.

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C. P. Harvey Q.C., in reply, dealt first with the question of real property. There are certain principles of international law on which States have agreed, but they have often applied those principles in different ways in their own municipal courts, in that sense making their own rules derived from the principles of international law: *The Cristina*.¹⁶ Whether it has become a rule of France, of Italy, or of Belgium that real property is not subject to immunity may or may not be the case, but it has not become a rule of English law. Of the statements on which the respondents relied, that in *Westlake* appears to be the broadest—that “no country can be expected to renounce the determination of “the property in its soil”—but it is difficult to see why this alleged exception of real property follows on his proposition. Hall, in the 7th ed., at p. 181, said that he could not really see why a distinction should be made between real property and movable property. In the 7th ed. of *Oppenheim*, vol. 1, at p. 716, it is said that “the local courts also have jurisdiction as regards immovable property held within the boundaries of the receiving State by an envoy, not in his official character, but as a private individual.”

The question of renouncing jurisdiction seems to be completely different from the question whether there shall be immunity. *Dicey's Conflict of Laws*, 6th ed. (1949), at p. 131, states that, subject to the exceptions he mentions, the court has no jurisdiction to entertain an action or other proceeding against any foreign sovereign, and his first exception is “the court has jurisdiction “to entertain an action against a foreign sovereign . . . if such “defendant . . . appears before the court, voluntarily waives any “privilege and submits to the jurisdiction of the court”; and the second exception is that “the court has jurisdiction to entertain “an action against a person belonging to the suite of an ambassador or diplomatic agent, if such person engages in trade.” And the footnote on p. 169 says that “how far jurisdiction as to “land is subject to the restrictions in rule 19 [p. 131] is not “clear.” The above are the only exceptions to his broad proposition. If the pronouncements of *Westlake* are taken as good, they raise a swarm of questions to which jurists have never addressed themselves at all. [Reference was also made to *Halsbury's Laws of England*, 2nd ed., vol. 1, pp. 27–8, and to *Wolff's Private International Law*, 2nd ed. (1950), p. 57.]

¹⁶ [1938] A.C. 485, 496–7.

With regard to the Continental jurists, the exception for immovables by foreign jurists arises from the distinction which they make between *jure gestionis* and *jure imperii*—that is completely unknown to English law. De Paepe's statement in the *Journal du Droit International Privé*, vol. 22, at p. 34, must be regarded as that of one who is schooled in that distinction. It is difficult to believe that Lord Atkin would have stated the position so dogmatically in *The Cristina*¹⁷ if he had thought that there was an exception of immovable property; and it is plain from the judgment of Lord Wright¹⁸ that something had been said in regard to it. It has never been decided in this country. The Italians seem to have given greater latitude to the exceptions; they say, let us look at in what character the foreign sovereign has purported to act, and then it becomes easy to decide whether the transaction is private or not; they went so far as to say that their rule was based on the nature of the act.

There are two French cases in which the court held that there is no rule as to immunity of immovable property, and that there could not be a distinction between his sovereign and private property: *Robine v. Consul de Grand Bretagne*, and *Rossignol v. Etat Tchecoslovaquie*, which are in 1951 Darras, *Revue Critique de Droit International Privé*, at pp. 307 and 305 respectively. Those, at any rate, are two decisions of the French courts which get nearer than anything which has been cited for the respondents to the question whether lawyers of the Continent do accept this exception from the doctrine of immunity, and it is said expressly in those cases that they do not.

Sir Robert Phillimore's observations in *The Charkieh*¹⁹ were obiter. That was a case about a ship, not land, and he held that the Khedive was not a sovereign. He said²⁰: "It was ingeniously argued . . . that it mattered not whether the suit was in rem or in personam, because the object of the *jus in rem* was to enforce the *jus in personam* . . . but this argument in its relation to the present case appears to me to be fallacious." [Reference was also made to *Taylor v. Best*.²¹] In foreign countries if a foreign sovereign does come in he is regarded as having made a submission to the jurisdiction. That is not the law in this country since the decision in *The Parlement Belge*,²² and if that is right the foundation goes from beneath the proposition that somehow or other proceedings in rem can be taken

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against a foreign sovereign without disturbing his independence or dignity. With regard to the suggestion that immunity is waived if the person claiming it incorporates himself into the jural system of the State, *Duke of Brunswick v. King of Hanover*²³ appears to be the only case in which anyone has incorporated himself into the jural system of a State; it was put expressly by Lord Langdale M.R. on the ground that the British subject on becoming King of Hanover did nothing to renounce his character as a British subject but, on the contrary, reaffirmed it, and took the oath of allegiance to Queen Victoria, took his seat in Parliament and exercised his rights as an English Peer. In those circumstances this concept of incorporating himself into the jural system seems to suggest that the test is allegiance, in other words, his subjection to the State as a subject. [Reference was also made to *Strousberg v. Republic of Costa Rica*²⁴ and to *In re Russian Bank for Foreign Trade*.²⁵]

Sir Robert Phillimore in *The Charkieh*²⁶ also said that the Khedive by his conduct waived the immunity. In saying that he was clearly speaking as a civilian. That might have been the law at the time of his judgment, but since then the law has been absolutely crystallized for our purposes by the *Kelantan* case,²⁷ *Mighell v. Sultan of Johore*²⁸ and *Kahan v. Pakistan Federation*,²⁹ by the last of which, it is submitted, the door was finally locked. The courts have established that there is no such thing as a waiver in advance, even by express words. The whole basis of the argument for the respondents that there is an immunity in respect of real property is simply not sound.

Sir Lionel Heald A.-G., recalled on the question of the alleged exception of real property, stressed the importance of maintaining so far as possible the current of established authority, and the question was whether this matter was not really settled already by English case law, with the result that all the refinements of foreign lawyers and tribunals were really unnecessary to the determination of the matter. He continued: The proposition of English law is that there is no such thing as international law in our courts, except such principles as have been incorporated into, or grafted on to, our law by statute or case law: *Chung Chi Cheung v. The King*³⁰; *Mortensen v. Peters*.³¹ The next point

²³ (1844) 6 Beav. 1, 50-51.²⁴ (1880) 44 L.T. 199, 201.²⁵ [1933] Ch. 745, 768.²⁶ L.R. 4 Ad. & Ecc. 59.²⁷ [1924] A.C. 797.²⁸ [1894] 1 Q.B. 149.²⁹ [1951] 2 K.B. 1003, 1020.³⁰ [1939] A.C. 160, 167-8.³¹ (1906) 8 F. (J.) 93, 101.

is whether there is not already in fact incorporated in our law a legal principle which covers this case. It is submitted that there is such a statement of the legal principle in *The Parlement Belge*,³² and that may be underlined by a reference to what Lord Wright said in *The Cristina*.³³ I emphasize that the fundamental principle is the impropriety of any proceeding against a sovereign himself, and it is immaterial in the application of that principle what was the subject-matter of the dispute. It may well be that there could be legislation to alter that position. The statements of Lord Atkin in *The Cristina*³³ and of Scrutton L.J. in *The Porto Alexandre*³⁴ do not admit of any qualification. The former said plainly that there is no limit to the immunity: "the courts of "a country will not implead a foreign sovereign, that is, they "will not by their process make him against his will a party "to legal proceedings whether the proceedings involve process "against his person or seek to recover from him specific property "or damages." It is submitted that if a matter in respect of a sovereign's own personal private property came before the court that sentence of Lord Atkin's would be regarded as decisive authority. If the third secretary of a foreign embassy entered into a transaction in relation to land, and broke his contract, one can do nothing about it. It is said, on the other hand, that the doctrine of immunity stated by Lord Atkin goes further than is recognized by international law. The difficulty is to find any principle on which the other countries are proceeding; the only one apparently is this distinction between *jure gestionis* and *jure imperii*. The foreign cases should be regarded with great care, because it is difficult to arrive at their real value without considering in each particular case the limitations which the country has adopted on this subject. *The Charkieh*³⁵ is not, it is submitted, a very firm rock to found on.

U. P. Harvey Q.C. Turning now to the argument for the appellant on the question whether the Sultan has submitted to the jurisdiction, extracts from Oppenheim and Hall seem fairly to express the points which were taken and on which reliance was placed for the respondents. The propositions may be accepted as a fair sample of the propositions for which the respondents contend in this case. It is submitted, however, that pronouncements of that sort by international jurists are unsafe guides for decisions on points of law, because the task of a judge who tries

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the case is completely different from that of the jurists. What-
ever may have been the position of His Majesty King George VI
in Singapore, the effective authority was that of the Japanese,
and it is impossible to say that the court addressed was in any
sense the court of His Majesty, and that by going to such court
the Sultan can be said to have submitted to the exercise of any
sovereignty in His Majesty. It may be that he can be said to
have submitted to the Japanese, but there is nothing to show that
they recognized him as a sovereign. To say that the Japanese
court is the same court is really begging the question, and not
addressing oneself to the question whether the court is an
emanation of the sovereign. It is not for juristic purposes the
same court. As Evans J. said in his judgment in the Court of
Appeal: "In fact a proclamation of annexation was issued and
"the name of the court was changed, indicating a changed
"court." [Reference was made to *Haile Selassie v. Cable &
Wireless Ltd.*³⁶ and *Haile Selassie v. Cable & Wireless Ltd. (No.
2)*.³⁷]

The next proposition for the respondents was that a foreign
sovereign by going to the courts of a country submits himself not
merely to the jurisdiction of the court, but to the judicial system
of the country. That is simply not true: the *Kelantan* case.³⁸
The Japanese Judgments and Civil Proceedings Ordinance is
legislation, and legislation is prima facie confined to those people
who owe allegiance to the legislative power: *Ex parte Blain, In
re Sawers*,³⁹ where it was said "that the legislation of any
"country binds its own subjects and the subjects of other
"countries who for the time bring themselves within the
"allegiance of the legislating power." Applying that to the
present case, one is at once brought up against the rule that no
sovereign owes allegiance to another sovereign. Had it been
intended to make the new rights given by the ordinance available
against a foreign sovereign it would have said so; not having said
so it does not. [Reference was also made to *R. v. Keyn*.⁴⁰] A
country can legislate specifically so as to include a foreign
sovereign and so catch him in respect of this particular subject-
matter, namely, jurisdiction of the courts, and it was actually
done in the "Chinese Aircraft in Hong Kong" case, see the
International Law Quarterly, 1951, vol. 4, pp. 159 and 176: there

³⁶ [1938] Ch. 839.³⁷ [1939] Ch. 182.³⁸ [1923] A.C. 395, 400, 413-4.³⁹ (1879) 12 Ch.D. 522, 528.⁴⁰ (1876) 2 Ex.D. 63, 84-5.

was there a Supreme Court of Hong Kong (Jurisdiction) Order in Council, 1950. That appears to be unique, but it has been done, and that is the sort of thing that should have been done to make the ordinance of 1946 available against the sovereign in this case.

B. MacKenna Q.C. in reply on the real property question. If what has been said about *Ex parte Blain*³⁹ and *R. v. Keyn*⁴⁰ were applied to this case it would mean that not only the judgment of the Sultan would not be subject to review under section 3 of the ordinance but also the judgment obtained by any foreigner. There were cases in the United States where the question arose as to the validity of acts done and judgments given during the occupation in the American civil war by courts which were not courts of the United States: *Johnson v. Atlantic, Gulf and West India Transit Co.*⁴¹; *Hickman v. Jones*⁴²; *United States v. Rice*⁴³ and *Fleming v. Page*.⁴⁴

Turning to the question of land, the Board may be reminded how limited is the relief the respondents are claiming in these proceedings. They are not claiming damages, or an order for delivery up of the land, or an injunction, or possession. All that they seek is a declaration by the court in Singapore that the judgment which impeaches their title to the land should be set aside, and the question is whether there is any immunity in the Sultan in respect of proceedings seeking that limited relief. A short general proposition which covers this case is that our courts have jurisdiction to adjudicate on the title to immovable property in this country and for that purpose to deliver judgments binding on foreign States, and it may be added, except possibly in the case of a foreign State's embassy or legation or other lands held by that State for public purposes. The authorities which I have cited support that proposition: Westlake, 7th ed., para. 191, p. 270; Dicey's Conflict of Laws, 5th ed., p. 195, note 1; and Phillimore's International Law, 3rd ed., vol. 2, pp. 141-2, 221, which shows that his view about real property being an exception to the general rule of immunity was unaltered by the decision in *The Parlement Belge*.⁴⁵

The argument in support of this proposition is that the general rule of immunity of foreign sovereigns from litigation is a universally recognized rule of international law. That general

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³⁹ 12 Ch.D. 522, 528.⁴⁰ 2 Ex.D. 63, 84-5.⁴¹ (1895) 156 U.S. 618, 645.⁴² (1869) 76 U.S. 197.⁴³ (1819) 17 U.S. 246.⁴⁴ (1850) 50 U.S. 603.⁴⁵ 5 P.D. 197.

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rule is qualified by an exception in favour of immovable property, and the assumption is that the rule as qualified by the exception forms part of our law because it is universally accepted. There is no authority which establishes that the general rule in England is not qualified by the exception. In support of the existence of that exception are Phillimore, Westlake, Hall and Oppenheim, and the two Italian decisions and the Russian. There are therefore three cases more or less in point, and there are also various dicta of foreign tribunals in favour of the exception. Against that view there are the two recent French cases of *Robine* ⁴⁶ and *Rossignol*.⁴⁷ Whether those cases are right or wrong, they have to be viewed in the light of the other decisions which have been brought to the Board's attention which, by way of decision or dicta, laid down that this question of immovable property stands outside the immunity. The trust cases are inconsistent with any general unqualified rule that English courts cannot adjudicate on questions of title to property so as to bind foreign States.

April 22. The judgment of their Lordships was delivered by VISCOUNT SIMON. This is an appeal from the decision of the Court of Appeal of the Colony of Singapore (Murray-Aynsley C.J. of Singapore, Sir H. C. Willan C.J. of the Federation of Malaya, and Evans J.) which arises in the following circumstances.

The appellant became Sultan of Johore, by succession to his father, in 1895. By an indenture dated December 1, 1903, he purported to convey to his wife, in consideration of the natural love and affection which he bore to her, two plots of land belonging to him in Singapore with the dwelling-houses erected thereon. On March 8, 1926, the lady died intestate, leaving surviving her the appellant and their only son, Abubakar Tunku (hereinafter called Abubakar), who is the first respondent. Abubakar was granted letters of administration of his mother's estate: on her intestacy he was entitled to three-quarters of the estate and the appellant to one-quarter. An indenture dated December 22, 1926, between the appellant and Abubakar purported to convey these two properties to the appellant to hold on trust for the eldest daughter of Abubakar during her life, and after her death for any of her issue then living. On March 1, 1939, this eldest daughter died intestate, an infant and unmarried, and Abubakar was on January 23, 1940, granted letters of

⁴⁶ 1951 Darras, Rev.Crit.de Droit ⁴⁷ Ibid. 305.
Int.Privé, 307.

administration of her estate. By Mohammedan law, on the girl's death intestate, her father, Abubakar, would become entitled to five-sixths of the properties and her mother, Ungku Fatimah, would be entitled to one-sixth. By an indenture dated June 28, 1944, between Abubakar, Ungku Fatimah and three individuals named as trustees, Abubakar and his wife assigned and transferred to the trustees certain properties and interests in properties in Singapore and in Johore, including the two properties above mentioned.

In the course of the late war, the whole of Malaya (including Johore) and the Colony of Singapore were invaded, and for a time occupied, by Japanese military forces. Singapore itself was thus occupied on February 16, 1942, and this occupation continued until the Japanese were driven out in September, 1945. On effecting their occupation the Japanese authorities expelled the British administration from Singapore: the courts of that Colony were closed and the British judges interned. There had previously been a Supreme Court of the Straits Settlements, embracing Singapore, Penang and Malacca, which sat in Singapore: this was distinct from the Supreme Court of the Federated Malay States. The Supreme Court of the Straits Settlements had jurisdiction to decide the title to immovable property in Singapore. In May, 1942, the Japanese military administration set up, in place of the former Supreme Court of the Straits Settlements, a High Court called the "Syonan Kotohoin," staffed with judges appointed by the Japanese administration, which exercised a jurisdiction generally corresponding with that belonging to the former Supreme Court of the Straits Settlements. The practice and procedure of the Syonan Kotohoin was, in all respects material to this appeal, indetical with the practice and procedure of the former Supreme Court of the Straits Settlements.

On May 3, 1945, the appellant took out an originating summons in the court of the judge at Syonan (Singapore), naming as defendant the Custodian of Enemy Property, Syonan. By this summons he applied to the Japanese court to determine the construction of the deeds of December 1, 1903, and of December 22, 1926, above referred to, and to decide whether, having regard to the fact that the parties to these deeds were Mohammedans, the deeds were properly and lawfully executed under the law applicable to the parties and were valid. The summons was heard by one Pillai, a Japanese-appointed judge of the Syonan Kotohoin. At the first hearing the defendant

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J. C. was represented, but on the adjournment for argument his representative was absent.

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Judgment in the appellant's favour was given by Pillai on June 18, 1945, and it was declared that Mohammedan law was applicable to the gifts contained in the two deeds and that the two gifts were void and of no effect, so that the properties with which they dealt reverted to the appellant as sole beneficial owner thereof.

When the Japanese were driven out in September, 1945, there followed a period during which authority was exercised by a British military administration, but on April 1, 1946, a new and separate Colony of Singapore was created by the Singapore Colony Order in Council, 1946 (S.R. & O., 1946, No. 464) made under the Straits Settlements (Repeal) Act, 1946. By section 14 of this Order in Council the Supreme Court of the Colony of Singapore was established, and it is this court which has been functioning in the Colony of Singapore since that date.

Judicial proceedings which had been commenced before the Japanese occupation in the former Supreme Court of the Straits Settlements were linked with the newly created Supreme Court of the Colony of Singapore by section 44 of the Order in Council, which provided:—"All proceedings (other than proceedings in the Prize Court) commenced before the 15th day of February, 1942, in any Court of Justice in or having jurisdiction in, the territory comprised in the Colony may be carried on in like manner as nearly as may be as if this Order and the Act of 1946 had not been made or passed, but in the corresponding Court of the Colony, and any such proceeding may be amended in such manner as may appear necessary or proper in order to bring it into conformity with the provisions of the Act of 1946 and of this Order."

It was considered necessary, as a consequence of the ending of Japanese occupation and the establishment of the Supreme Court of the Colony of Singapore, to provide an opportunity (1) for carrying on before the appropriate court of the Colony proceedings which had been commenced but not concluded before a Japanese court during the occupation, and (2) for reviewing decrees made by a Japanese court in the appropriate court of the Colony with a view to enabling an appeal to be brought against such decree or with a view to setting aside such decrees as ought not to stand. These objects were secured by the Japanese Judgments and Civil Proceedings Ordinance, 1946 (Singapore Ordinance No. 37 of 1946), the long title of which reads:—"An Ordinance to make

“ provision with regard to judgments, orders and decrees of
 “ Japanese courts and for the carrying on of proceedings instituted
 “ in such courts during the period of Japanese occupation.”

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Section 4 of this Ordinance provides:—

“ (1) A party to any proceedings commenced before a Japanese
 “ court which were pending at the cessation of the Japanese
 “ occupation, may apply to the appropriate court, within three
 “ months from the commencement of this Ordinance or such
 “ extended time as the appropriate court may allow, for leave to
 “ carry on such proceedings as proceedings of the appropriate court.

“ (2) Upon the hearing of the application the appropriate
 “ court may order such proceedings to be carried on as though
 “ they had been instituted before the appropriate court and may
 “ order such amendments and give such consequential or other
 “ directions in the matter as may seem just.”

And section 3 of the Ordinance provides:—

“ (1) Any party to the proceedings in which a Japanese decree
 “ was made or given or any person aggrieved by such decree may,
 “ within three months from the commencement of this Ordinance,
 “ or within such extended time as the appropriate court may
 “ allow, apply in the prescribed manner to the appropriate court
 “ for an order—

“ (a) that such decree be set aside either wholly or in
 “ part; or

“ (b) that the applicant be at liberty to appeal against such
 “ decree.

“ (2) Upon the hearing of an application under the provisions
 “ of subsection (1) of this section the appropriate court may, sub-
 “ ject to the provisions of this section, make such order or orders
 “ thereon as, in the circumstances of the case, may seem just.

“ (3) No Japanese decree shall be set aside on the ground that
 “ the person or persons constituting the court whose decree is in
 “ question was or were not appointed in accordance with the
 “ provisions of, or did not possess the qualifications specified
 “ in, the existing laws.

“ (4) Without prejudice to the generality of the provisions of
 “ subsection (2) of this section, the Japanese decree may be set
 “ aside on any of the grounds following—

“ (a) that it was obtained as a result of such force or threat
 “ of force, injury or detriment to any party to the proceedings
 “ or other person as in the opinion of the appropriate court was
 “ sufficient to render the action of the party in relation to the
 “ proceedings involuntary;

J. C.	“(b) that any necessary party did not appear personally but
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	“authority;
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v.	“laws; or
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	“consider to be sufficient.”

Under this Ordinance Abubakar, the first respondent, together with the two other respondents as trustees, took out an originating summons in the High Court of the Colony of Singapore, claiming that they were persons aggrieved by the decree of June 18, 1945, of the Japanese court in the appellant's favour, and applying to set aside this decree, or, alternatively, asking for liberty to appeal against the Japanese decree on grounds therein stated. On learning that the originating summons had been issued, the appellant's solicitors entered a conditional appearance on his behalf, which was followed up by a summons before the judge in chambers, in which the appellant applied that the originating summons might be set aside and all further proceedings under it stayed on the ground that the court had no jurisdiction over the appellant, who claimed to be “a sovereign ruler.” It is the decision on this summons which now comes before their Lordships on appeal.

The appellant's application was heard in the High Court by Gordon Smith J. in March, 1949, and by order dated April 7, 1949, the summons was dismissed with costs. The judge held that at the material time the appellant was a sovereign ruler, but that he had waived his immunity by issuing the originating summons in the Syonan Kotohoin during the Japanese occupation. He held that the proceedings now sought to be stayed were not new proceedings, but were a continuation of the earlier proceedings in which the appellant had for the time being succeeded.

The appellant appealed from Gordon Smith J.'s decision to the Court of Appeal of the Colony of Singapore. His appeal was dismissed, but the reasons given by the three judges materially differ and must be separately summarized. Murray-Aynsley C.J. held that the appellant's claim to be a sovereign ruler could not be established otherwise than by a statement made on behalf of His Majesty King George VI to that effect, and that the communications then before the court from His Majesty's Secretary of State for the Colonies did not amount to such a statement. He further held that, if the sovereign status of the appellant had been duly

established, there would have been no waiver by the appellant of his resulting immunity from the proceedings now taken against him by the respondents.

Sir H. C. Willan C.J., on the other hand, held that, in a case where certificates from the Colonial Office were not conclusive one way or the other, the court was not precluded from looking to other evidence to determine whether the appellant was an independent sovereign. He considered that the right view to take on all the material before him was that the appellant was an independent sovereign. On the question of waiver, however, he held against the appellant. Waiver of a sovereign's immunity, in a case where the sovereign has himself instituted proceedings, continued, in his view, to operate if the application now made by the respondents to reverse the decree which the appellant had obtained was a continuance of the proceedings instituted by the appellant in the Japanese court. He held that the provisions of the Ordinance of 1946 above set out had the effect of making the present application a continuation of such proceedings, and therefore the claim by the appellant of immunity from the jurisdiction of the High Court of the Colony of Singapore failed.

The third judge, Evans J., discussed the question whether other material can be considered on the question of sovereignty when there is no conclusive certificate from a Secretary of State before the court. He held that the Syonan Kotohin was not the same court as that in which the respondents brought the present proceedings, and that the present proceedings were not the same as the proceedings started by the appellant. But his judgment was not based on his conclusion on these issues. The ground on which this judge gave his decision against the appellant was that the appellant, notwithstanding his claim to be an independent sovereign and notwithstanding the view that he had not waived his immunity, was none the less subject to the jurisdiction of the court inasmuch as the matter to be determined was "one concerning land, which is undoubtedly within the jurisdiction and which is the subject of a private and personal claim of the Sultan, and not a claim of public property of the State." Mr. MacKenna, for the respondents, cited various dicta, both English and foreign, in support of this view, and referred in this connexion to the statement of Sir Robert Phillimore in *The Charkieh* ⁴⁸—a statement which was not in fact necessary for the decision—where that learned civilian stated that a sovereign's exemption

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⁴⁸ L.R. 4 Ad. & E. 59, 97.

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from suit "is admitted not to apply to immovable property," and that this is one of "the universally acknowledged exceptions" to the general rule of the sovereign's immunity." As will appear hereafter, their Lordships do not find it necessary to pronounce on this proposition in the present appeal.

There are thus three main questions which have been raised in this litigation, the answers to which may be material in deciding it. First, is the appellant in this litigation to be regarded as a foreign sovereign? Secondly, if so, has he waived his immunity so as to disentitle him to a stay of proceedings on the respondents' originating summons? And thirdly, if both the above questions are answered in the appellant's favour, does this sovereign immunity extend to exclude the jurisdiction of the court in a case where proceedings are connected with his claim to be entitled to immovable property situate within the jurisdiction of the court?

The first of these questions, which gave so much trouble to the courts below, appears to their Lordships to be now definitely answered in the appellant's favour. Subsequent to the judgment and order of the Court of Appeal, correspondence passed between twelve Rulers of the Malay States and the then Colonial Secretary in which the former complained that the replies hitherto sent from the Colonial Office in answer to the request of the courts in Singapore for information as to the status of the appellant were ambiguous, and that the Secretary of State, instead of issuing the required certificate, appeared to wish to leave the courts to decide the matter in the light of the recent establishment of the Malay Federation. However, on February 1, 1951, the Secretary of State wrote a further letter to the Rulers of the Malay States in which it is categorically asserted that "His Majesty's Government regard Your Highnesses as independent sovereigns in so far as your relations with His Majesty are concerned."

At the hearing before the Board this document was tendered to their Lordships, without objection from the respondents, as containing the necessary and conclusive information from the proper quarter. Their Lordships so accept it and take judicial notice of the fact so certified. They can therefore proceed on the admitted basis that the appellant was recognized by His Majesty's Government at the relevant time as an independent sovereign entitled to the immunities in respect of litigation which attach to that status.

This renders it unnecessary to decide in this appeal a point on which some difference of opinion appears to be expressed in the

speeches of the majority in *Duff Development Co. Ltd. v. Kelantan Government*,⁴⁹ namely, whether the status enjoyed by a foreign sovereign in a British court can be established, in case of doubt, only by certificate issued by the appropriate Secretary of State on behalf of the Crown, or whether a court might be entitled, if the Crown failed to answer the inquiry in conclusive terms, to accept and act on "secondary information" of another kind. (Contrast the speeches of Viscount Cave and Viscount Finlay with that of Lord Sumner.)

The second question concerns waiver. The appellant himself started the proceedings before the Japanese court, thereby invoking its jurisdiction on his behalf. As plaintiff, he obtained the decree declaring that he was the beneficial owner of the properties in question. If, therefore, the steps taken by the respondents with a view to reversing this decision are in the nature of an appeal from it to a court having jurisdiction to reverse the decision which the appellant has obtained, he could not object to being made respondent in these appeal proceedings, for his original submission to the original court binds him to accept the jurisdiction on appeal. If, on the other hand, the respondents' application to the High Court of the Colony of Singapore to reverse the decree is a "new" proceeding, and not a continuation of the previous one, the appellant's objection that he is a foreign sovereign would prevail, so far as the new proceeding impinged on his sovereign immunity. In *Duff Development Co. Ltd. v. Kelantan Government*,⁴⁹ after the Kelantan Government, which was recognized by the British Crown as a sovereign State, had agreed to arbitration and had itself applied to the British court to set aside the award, it was held that, when proceedings were taken against it to enforce the award, this was a different proceeding in which it was entitled to set up its sovereign immunity, notwithstanding that it had waived this immunity in the previous proceedings. Viscount Cave put the contrast thus⁵⁰: "The application for leave to enforce the award "is a new proceeding, and though connected with the earlier "application is distinct from it."

Here, as Willan C.J. points out, the application of the respondents is concerned with the very matter raised by the appellant in the Japanese court, namely, the title to these properties. Their Lordships are of opinion that section 3 of the Ordinance of 1946 on its true construction authorizes an application in the

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⁴⁹ [1924] A.C. 797.

⁵⁰ Ibid. 810.

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nature of an appeal from the Japanese decree. The Ordinance does not treat Japanese decrees as of no effect. Neither does it treat them as conclusive. It provides for their review, with the result that they might either be confirmed or modified or reversed. The procedure authorized is essentially a carrying on of the proceeding already instituted and not a new and distinct proceeding. The language of section 3 actually speaks of an appeal, and the purpose of the order is to provide a means of revising and, if necessary, correcting decrees made by the Japanese court during the occupation. No doubt it is anomalous for a tribunal set up by one authority to operate as a court of appeal from the decisions of a tribunal set up by a different and previous authority, but this is what the Ordinance of 1946 does, and subsection (4) of section 3 indicates good and necessary reasons for doing it. Otherwise, an erroneous decision given by the Japanese court affecting private rights would stand without the possibility of correction. In the present instance the Japanese court has decided, whether rightly or wrongly, that deeds previously executed by the appellant which purported to convey his private property in Singapore to others were invalid and that the properties still belong to him. In deciding this issue, the proper law to apply to the question of title is the same as it was before the Japanese occupation, inasmuch as military occupation, and even annexation, does not in itself change the law in the area occupied; the only change is in the court and in the judges who are to apply the law. The question, therefore, which is raised by the originating summons issued by the respondents and which is to be determined by the High Court of the Colony of Singapore is whether the decision of the Japanese court was right or wrong, and to determine this the appellant is made respondent in what is in substance an appeal in proceedings which, by force of the Ordinance of 1946, are a continuance of the proceedings which the appellant himself instituted, and in any case are put in the same position as an appeal by section 3.

The conclusion that the appellant must be treated as having submitted to the jurisdiction in the respondents' current proceedings makes it irrelevant to consider the third question which would otherwise have called for decision. That is, the question whether the principle that affords to a foreign independent sovereign immunity from process in our courts is subject to any exception in the case of proceedings that concern the title to immovable property situate within the area of the court's territorial jurisdiction. The point was, however, very fully argued

during the course of the hearing and, moreover, in view of its public importance their Lordships invited and received the assistance of the Attorney-General to aid their consideration. While, therefore, they think that it would be wrong to express an opinion on an issue which does not, properly speaking, now arise, they are unwilling to conclude their advice to Her Majesty without making reference to one aspect of this controversy which was much canvassed before them.

Their Lordships do not consider that there has been finally established in England (from whose rules the rules to be applied in the court at Singapore would not differ) any absolute rule that a foreign independent sovereign cannot be impleaded in our courts in any circumstances. It seems desirable to say this much having regard to inferences that might be drawn from some parts of the Court of Appeal's judgment in *The Parlement Belge*,⁵¹ and from the speech of Lord Atkin in *The Cristina*.⁵² The word "implead" is capable of more than one meaning when used in relation to judicial proceedings, which themselves comprehend a great variety of forms, and further distinctions have been suggested between what is direct and what is indirect impleading: but for the present purpose the definition of "impleading" can be taken to be that which is laid down by Brett L.J. in the former case where he compares the position of a shipowner, whose vessel is seized in proceedings alleging liability arising from a collision, with the position of a subsequent innocent purchaser of the vessel. The Lord Justice says⁵³: "Either is affected in his interests by the judgment of a court which is bound to give him the means of knowing that it is about to proceed to affect those interests and that it is bound to hear him if he objects. That is, in our opinion, an impleading." Impleading, in this sense, does not depend merely on an answer to the more technical question whether a person is actually a party, or ought to be regarded as a necessary party, to the proceedings.

There have certainly been cases in the Court of Chancery in which a foreign sovereign has been impleaded to the extent that the rights to a trust fund under the jurisdiction of the court have been the subject of adjudication despite the fact that the sovereign has a possible interest in the fund. The best known case is *Larivière v. Morgan*⁵⁴; and, although the decision in that case was reversed on its facts when it reached the House of

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⁵¹ 5 P.D. 197.⁵² [1938] A.C. 485.⁵³ 5 P.D. 197, 219.⁵⁴ (1872) L.R. 7 Ch. 550.

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Lords, Lord Cairns seems to have felt no doubt as to the propriety of the jurisdiction exercised.⁵⁵ Indeed, in *Duke of Brunswick v. King of Hanover*⁵⁶ Lord Langdale evidently contemplated that in proceedings of such a kind the name of the foreign sovereign would be included among those of the defendants.⁵⁷

An action in rem against a ship impleads persons who are interested in the ship. That is settled law. There is even high authority for the view that such persons are, or may be, directly impleaded by such proceedings (*The Cristina*⁵⁸). If, however, it had been definitely determined that in no case could a foreign sovereign be impleaded without his consent, there could have been no justification for reserving the case of a sovereign's ship engaged in ordinary commerce—a reservation that was in fact made by the majority of the House of Lords in *The Cristina*.⁵⁸ For a sovereign is impleaded by an action in rem against his ship, whether it is engaged in ordinary commerce or is employed for purposes that are more usually distinguished as public. The extent of the impleading is the same in the one case as in the other. Indeed, a great deal of the reasoning of the judgment in *The Parlement Belge*⁵⁹ would be inexplicable if there could be applied a universal rule without possible exception to the effect that, once the circumstance of a foreign sovereign being impleaded against his will can be established, a proceeding necessarily becomes defective by virtue of that circumstance alone.

To say this is merely to disavow an alleged absolute and universal rule. It does nothing to throw doubt on the existence of the general principle. Nor is it necessary for their Lordships to express any opinion in this case on the question whether and, if so, to what extent, proceedings which concern the title to immovable property within the jurisdiction form an exception from this general rule.

Their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellant must pay the costs of the appeal.

Solicitors: *E. F. Turner & Sons; Peacock & Goddard.*

⁵⁵ L.R. 7 H.L. 423, 430.

⁵⁶ 6 Beav. 1.

⁵⁷ Ibid. 39.

⁵⁸ [1938] A.C. 485, 494, 505.

⁵⁹ 5 P.D. 197.

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KEMSLEY APPELLANT;
 AND
 FOOT AND OTHERS RESPONDENTS.

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 Nov. 21, 22,
 26, 27, 30.
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 Feb. 25.

Defamation—Libel—Plea of fair comment—No facts stated in words complained of—Whether essential—R.S.C., Ord. 19, r. 22; Ord. 25, r. 4.

Under the heading “Lower than Kemsley” (referring to a well-known newspaper proprietor) a periodical published an article criticizing the conduct of a newspaper unconnected with him. In an action by him alleging libel, fair comment was pleaded by the defendants. An application under Ord. 19, r. 27 and Ord. 25, r. 4 was made to strike out this defence on the ground that it could not succeed because no facts appeared in the article to support the statement in the headline:—

Held, that in order to admit the plea of fair comment it was unnecessary that all the facts on which the comment was based should be stated in the alleged libel. Here a sufficient substratum of fact was to be implied from the words, *viz.*, that the plaintiff was responsible for the press of which he was the active proprietor. The criticism was that the press was low and any facts sufficient to justify that statement would entitle the defendants to succeed. Failure to establish all the facts given in the particulars of defence would not necessarily disentitle them to succeed.

The relevant questions to be determined were: (1), Is the subject-matter indicated with sufficient clarity to justify comment being made? and (2) Is the comment actually made such as an honest, though possibly prejudiced, man might make?

Per Lord Porter: Newspapers, being submitted to the public, are a proper subject-matter of comment in the same way as literary works and the comment on them, in order to be fair, need not be confined to their literary content.

Decision of the Court of Appeal [1951] 2 K.B. 34 affirmed.

APPEAL from the Court of Appeal (Somervell, Jenkins and Birkett L.JJ.).

The facts, stated by Lord Porter, were as follows: An alleged libel was contained in an issue of the Tribune dated March 10, 1950. It began as follows:

“Lower than Kemsley
 “by Michael Foot

“The prize for the foulest piece of journalism perpetrated in this country for many a long year, and that is certainly saying

* *Present*: LORD PORTER, LORD GODDARD, LORD OAKSEY, LORD RADCLIFFE and LORD TUCKER.

H. L. (E.) "something, must go to Mr. Herbert Gunn, editor of the
 1951 "Evening Standard and all those who assisted him in the publi-
 KEMSLEY cation of an attack on John Strachey last week." (The article
 v. went on to make a somewhat violent attack on the conduct of the
 FOOT. Evening Standard, a newspaper controlled by Lord Beaverbrook.)

At the instance of the plaintiff, Viscount Kemsley, a writ was issued in an action for libel against the author of the article, a member of the editorial board (Jennie Bevan), the editor (Evelyn Anderson), the publishers (Tribune Publications Ltd.) and the printers (Hardy Press Ltd.). Paragraph 1 of a statement of claim alleged: "The plaintiff is and is widely known to be a director "and shareholder in companies owning newspapers and is "generally known to the public as a newspaper proprietor. He "has no connection with the Evening Standard newspaper." By paragraph 4 it was alleged that the words meant that he "used his position as a director of newspaper companies to pro- "cure the publication of statements he knew to be false and "that his name was a byword in this respect."

Paragraph 5 of the defence was in the following terms: "Further or in the alternative if and so far as the said words "refer to the plaintiff they are fair comment made in good faith "and without malice upon a matter of public interest namely the "control by the plaintiff of the newspapers (other than the "Evening Standard referred to in paragraph 1 of the statement "of claim). Particulars of the specific facts upon which the said "words are fair comment are delivered separately." The particulars, which were described as being "the facts upon which "the said words are a fair comment," contained excerpts from the plaintiff's newspapers and allegations of certain respects in which they were inaccurate or untruthful together with complaints of their tone and the impropriety of their methods of dealing with the news in them, even when it was accurate. The object of the particulars was to show the responsibility of the plaintiff for the contents of the newspapers. Paragraph 3 of the particulars began as follows: "The plaintiff in exercise of such "control as aforesaid" (i.e., general editorial control) "caused "or permitted to be published as items of news, matter which "did not correspond with the facts or was so coloured with com- "ment as not to give an accurate representation of the news it "purported to report and headlines which distorted the news "reported thereunder." No allegation of conscious lying was made in terms.

On a summons in the action under Ord. 19, r. 27, and Ord. 25, r. 4, an application was made to strike out paragraph 5 of the defence and the particulars thereunder "on the ground" that the same are vexatious and contrary to the rules of "pleading and tend to embarrass prejudice and delay the fair trial of the action and disclose no reasonable answer and are "frivolous." The master to whom the application was made struck out two paragraphs of the particulars but refused to strike out paragraph 5 of the defence or any of the other particulars. On appeal, Parker J. in chambers struck out paragraph 5 itself and all the particulars under it. Hardy Press Ltd. did not appeal from this decision but delivered an amended defence which contained an apology and no plea of fair comment. The other defendants, whose positions did not differ one from the other, appealed to the Court of Appeal, which allowed the appeal and restored the master's order, at the same time giving the defendants leave to amend the particulars of defence. The plaintiff appealed to the House of Lords.

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Diplock K.C. and *T. G. Roche* for the appellant (plaintiff). It is essential to bear in mind that what is here pleaded as being the matter commented upon is the conduct by the plaintiff of his newspapers, not merely the contents of the newspapers themselves. In the particulars are set out a number of instances, none of which was referred to in the article, in which it is alleged that the plaintiff caused or permitted misrepresentations of fact in his newspapers.

Even where couched as an expression of opinion, words in order to be defamatory must contain either expressly or implicitly one or more statements of fact relating to the plaintiff. The bare statement, "I think A's conduct is dishonourable," involves not one but two statements of fact: first, an express statement of the fact—in itself defamatory although it may be susceptible of the defence of fair comment—that the author holds an unfavourable opinion of the plaintiff, and, secondly, an implied statement of fact, viz., that A has been guilty of conduct which justifies the author's holding this opinion. The statement, "A has done so" and so and I think this conduct is disgraceful," also involves two statements of fact: first the same statement of fact as before about the author's opinion, and, secondly, an express statement of fact of what the plaintiff's conduct was, which excludes any implied statement that the plaintiff had been guilty of conduct other than that which is stated in the words used.

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It is clear on the authorities that in order to succeed in a defence of fair comment the defendant in the second example must, as a preliminary step, satisfy the jury that the facts expressly stated as to what the plaintiff's conduct was are true. It is submitted that the same principle applies to the first example, and that the defendant must satisfy the jury that the implied statement of fact as to the conduct of which the plaintiff was guilty is true. It is only when he has done this that he can, under a plea of fair comment, rely on the subjective test of his own honesty in holding the opinion which he has expressed on those facts, whether they be stated expressly as in the second example, or by implication as in the first example.

The first question for a jury here would be: Have the defendants proved to its satisfaction that the plaintiff is guilty of the conduct which the article imputes to him? In substance this is justification and it should be so pleaded. Unless that question is answered in the affirmative a defence of fair comment cannot arise. By adopting their present form of pleading the defendants are trying to avoid that question being put. They want the jury to be called upon to say merely whether the defendants, basing their views on some of the facts alleged in the particulars but never identified to the reader of the article, honestly held the opinions which they expressed; and if so the jury are to be asked to give a verdict for the defendants.

The defence of fair comment is no more than the law's recognition of the right of a person to express an opinion on matters of public interest which he identifies, and to attempt to convert others to his view. Comment must be an expression of opinion on identified facts. If the facts are not identified but are left to be implied from the expression of opinion itself, the only defence open is justification. The essence of the submission on behalf of the plaintiff as to the law of fair comment is that one is not entitled to comment on the conduct of a public man unless one sufficiently identifies the facts on which the comment is based so that the reader may form an opinion as to the validity of the comment: *Popham v. Pickburn*¹; *Hunt v. Star Newspaper Co. Ltd.*²; *Roos v. Stent and Pretoria Printing Works Ltd.*³ Accordingly, the plea of "fair comment" is not open to the defendants here since the facts on which they allege the article to be comment are neither stated nor referred to therein.

¹ (1862) 7 H. & N. 891.³ 1909 T.S. 988.² [1908] 2 K.B. 309, 315.

The development of the law relating to fair comment falls into three periods: (1) from the beginning of the nineteenth century; (2) from the middle of the nineteenth century: *Campbell v. Spottiswoode* ⁴; (3) from the beginning of the twentieth century, since when the modern law has developed. Originally, the defence of fair comment was covered by the plea of "not guilty," unlike the defence of justification which required a special plea. It was then grouped with privilege as an example of privileged communications: see Bullen and Leake's *Precedents of Pleadings*, 3rd ed., pp. 302-4. It first emerged as a distinct plea shortly after the Common Law Procedure Act, 1853: see *Earl of Lucan v. Smith*.⁵ Its evolution was slow. At the end of the nineteenth century there developed the "rolled up plea" that in so far as the words complained of consisted of allegations of fact they were true and in so far as they consisted of expressions of opinion they were fair comment. This plea led to a conflict of judicial opinion as to whether it was merely a defence of "fair comment" or was a plea of justification coupled with "fair comment." In 1925 *Sutherland v. Stopes* ⁶ resolved this controversy in favour of the former view; but all cases between 1890 and 1925 require careful reading in order to see on which basis they were decided. If the article complained of contained both facts and defamatory comment the plaintiff might sue (a) on the whole article; (b) on some facts and comment; or (c) on the comment alone. In the first case the defendant would, after 1890 when the "rolled up plea" first appeared in *Penrhyn v. Licensed Victuallers Mirror*,⁷ have used that plea. In the second case he would have used an adaptation of the same plea. In the third case the defence would be simply "fair comment" on properly identified facts. But in no reported case, except where the "rolled up plea" was treated as including a defence of justification, has a defendant pleading "fair comment" in any of these three forms been permitted to rely in support of such plea upon facts not identified in the article containing the defamatory comment.

Criticism of a literary work, in order to come within the defence of "fair comment," must be confined to criticizing it as literature. When one says that A's book is a bad book the only innuendo that can be placed on that is that some people (though not all) might consider it to be a bad work. It would be the same

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⁴ (1863) 3 B. & S. 769; 32 L.J.

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⁵ (1856) 1 H. & N. 481; 26 L.J.

Ex. 94.

⁶ [1925] A.C. 47.⁷ (1890) 7 T.L.R. 1.

H. L. (E.) in the case of a play. Tastes notoriously differ and so the innuendo is not necessarily that the author is incompetent. But where it is said that a book purporting to be veracious is a tissue of lies, the defence is bound to justify that statement as a fact; the defendant cannot, by pleading "fair comment," escape liability by proving his honest but mistaken belief that the book was a tissue of lies.

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In the present case, since paragraph 5 and the particulars under it must be read together (see Ord. 19, r. 22a), it is evident that this is comment on the conduct of the plaintiff not limited to the contents of his newspapers. This comment is that the plaintiff in conducting them caused or permitted news to be printed which was not true. Therefore, the article could not be "fair comment," analogous to literary criticism, on the Kemsley Press. The jury, when the matter comes to trial, should be directed that if they were satisfied that the words imputed to the plaintiff conduct of the kind indicated in the innuendo, the defence that the words were fair comment on the Kemsley Press was not available. [They referred to *Carr v. Hood*⁸; *Cooper v. Lawson*⁹; *Parmiter v. Coupland*¹⁰; *Merivale v. Carson*¹¹; *McQuire v. Western Morning News Co. Ltd.*¹²; *Joynt v. Cycle Trade Publishing Co.*¹³; *Plymouth Mutual Co-operative and Industrial Society Ltd. v. Traders' Publishing Association*¹⁴; *Digby v. Financial News Ltd.*¹⁵; *Peter Walker & Son Ltd. v. Hodgson*¹⁶; *Wheatley v. Anderson*¹⁷; and *Lyons v. Financial News Ltd.*¹⁸; see also *Strauss v. Francis*¹⁹; *Burton v. Board*²⁰; *Aga Khan v. Times Publishing Co.*²¹; and *O'Brien v. Marquis of Salisbury*.²²]

Gardiner K.O. and *Herbert Baxter* for the respondents (defendants). In this branch of the law of libel there are particular difficulties in foreseeing, in any particular case, the application of general principles to a different sort of statement. There is also the ambiguous nature of the word "facts" in the expression "the facts commented on," which may mean the subject-matter or may mean the detailed facts. It is agreed that a defendant must have identified the subject-matter commented on but he need not have identified the facts. It has never been necessary

⁸ (1808) 1 Camp. 354, 355.⁹ (1838) 8 A. & E. 746.¹⁰ (1840) 6 M. & W. 105.¹¹ (1887) 20 Q.B.D. 275, 283-4.¹² [1903] 2 K.B. 100.¹³ [1904] 2 K.B. 292, 297-8.¹⁴ [1906] 1 K.B. 403.¹⁵ [1907] 1 K.B. 502.¹⁶ [1909] 1 K.B. 239.¹⁷ 1927 S.C. 133.¹⁸ (1909) 53 S.J. 671.¹⁹ (1866) 4 F. & F. 939.²⁰ [1929] 1 K.B. 301.²¹ [1924] 1 K.B. 675.²² (1889) 6 T.L.R. 133.

to state the facts on which an expression of opinion is based. One may not have a fact on which one's comment is based. If one says "I like Smith better than Brown," that is a comment but it is not necessarily one based on fact, since one may not know the reason for the preference. In the case of the defence of fair comment the facts commented on need not be stated or referred to in the article complained of provided they can be inferred. The question whether or not they can be inferred must be determined by reference to the whole of the words, their context and the circumstances of publication, including for this purpose any relevant facts likely to be known to the reader. When the action is tried by a jury it is for the jury and for no one else to decide whether the subject-matter of the words complained of was apparent to those to whom they were published: *Broome v. Agar*.²³

The basis of the defence of fair comment is that in certain circumstances people should not only be allowed but should be encouraged to say what they think. This is the root of privilege in the law of libel and it is exemplified in the case of giving a servant a character. In the case of literary and artistic criticism it was felt that if a man put something before the public he must submit to honest expressions of opinion by the public. A critic may say what he thinks of a play performed only once although the vast majority of the public cannot go to see it to judge for themselves, for the defence of fair comment is not based on the proposition that every person who reads a criticism should be in a position to judge for himself. The defence of fair comment is available to a defendant who has done no more than express his honest opinion on publications put before the public. It is sufficient for him to have identified the publications on which he is commenting, without having set out such extracts therefrom as would have enabled his readers to judge for themselves whether they agreed with his opinion or not.

In the present case the comment was criticism of the way in which the plaintiff's newspapers were conducted and it asserted that this was of a low character. The defendants were entitled to criticize that conduct as a matter of public interest and to comment fairly on it. That press was widely read and the public generally would know at what the criticism was directed since the subject-matter was far better known than a book or play. On the facts pleaded, an honest man could take the view that the

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²³ (1928) 138 L.T. 698.

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Once it is conceded that all the facts do not have to be set out in detail it is hard to draw any line. The necessity alleged by the plaintiff to include with the comment some reference to the facts relied on is not supported by English authority. The only English authority which seems to support the plaintiff is *Hunt v. Star Newspaper Co. Ltd.*,²⁴ but in that case it was not intended to lay down that it was necessary to have set out the facts in order to be able to plead fair comment. [They referred to *Carr v. Hood*²⁵; *Cooper v. Lawson*²⁶; *Earl of Lucan v. Smith*²⁷; *Popham v. Pickburn*²⁸; *Campbell v. Spottiswoode*²⁹; *Strauss v. Francis*³⁰; *Wason v. Walter*³¹; *Merivale v. Carson*³²; *O'Brien v. Marquis of Salisbury*,³³ per Field J.; *McQuire v. Western Morning News Co. Ltd.*³⁴; *Joynt v. Cycle Trade Publishing Co.*³⁵; *Dakhyl v. Labouchere*³⁶; *Homing Pigeon Publishing Co. Ltd. v. Racing Pigeon Publishing Co. Ltd.*³⁷; *Peter Walker & Son Ltd. v. Hodgson*³⁸; *Lyons v. Financial News Ltd.*³⁹; *Aga Khan v. Times Publishing Co.*⁴⁰; *Sutherland v. Stopes*⁴¹; *Burton v. Board*⁴² and *Turner v. Metro-Goldwyn-Mayer Pictures Ltd.*⁴³]

Further, this attempt to strike out paragraph 5 and the particulars thereunder under R.S.C. Ord. 19, r. 27, and Ord. 25, r. 4, was not justified and was not a proper use of the powers given under them, since they should only be used in clear cases. When a serious discussion of legal principles arises the procedure laid down in Ord. 25, r. 2, should be adopted. This point should accordingly have been raised at the trial. It might never have arisen if the jury had held that the words were not defamatory. The best occasion for trying a dispute of fact and law is the trial of the action. The expense is likely to be less than that of the procedure here adopted involving an appeal to this House. By Ord. 25, r. 1: "No demurrer shall be allowed." The appellant

²⁴ [1908] 2 K.B. 309, 319.

²⁵ 1 Camp. 354, 357-8.

²⁶ 8 A. & E. 746.

²⁷ 1 H. & N. 482; 26 L.J.Ex. 94.

²⁸ 7 H. & N. 891.

²⁹ 3 B. & S. 769; 32 L.J.Q.B. 185.

³⁰ 4 F. & F. 939.

³¹ (1868) L.R. 4 Q.B. 73.

³² 20 Q.B.D. 275.

³³ 6 T.L.R. 133, 135, 137.

³⁴ [1903] 2 K.B. 100.

³⁵ [1904] 2 K.B. 292.

³⁶ [1908] 2 K.B. 325, n.

³⁷ (1913) 29 T.L.R. 389.

³⁸ [1909] 1 K.B. 239.

³⁹ 53 S.J. 671.

⁴⁰ [1924] 1 K.B. 675.

⁴¹ [1925] A.C. 47, 58, 63.

⁴² [1929] 1 K.B. 301.

⁴³ [1950] W.N. 83; [1950] 1 T.L.R. 342.

is trying to get behind that rule, but it is important that it should be maintained. The summons should have been dismissed.

Diplock K.C. in reply. It is not admitted that there may be comment which is not comment on facts expressly or implicitly stated. To plead fair comment is to concede that there are facts on which one is commenting and that the words one has published state some facts expressly or by implication. The basis of the defence is that the facts stated in the article, whether expressly or by implication, must be proved to be true. It is only available on the basis of facts truly stated.

The questions here are: (1) What set of facts about the plaintiff is expressed or implied in the article? (2) Have the defendants proved conduct of the sort implied therein? It is not open to ask the jury the question: Have the defendants proved conduct of some other kind? The defendants are seeking to have put to the jury not the question "Are you satisfied that the plaintiff is "guilty of the conduct which the article imputes to him?" but "Were the defendants honestly, although possibly mistakenly, "of opinion that the facts which they state in their particulars "and which may fall far short of what was imputed, warranted "the comment which they made?" They are seeking to avoid the necessity of proving to the satisfaction of the jury that the facts which they implied are true by putting forward their own construction of the libel and getting a finding of the jury on the basis of that construction. Before the jury can come to the question of the honesty of the defendants at all it is essential for them to say whether conduct of the sort imputed to the plaintiff has been proved.

Their Lordships took time for consideration.

1952. Feb. 25. LORD PORTER. My Lords, this case is concerned with the determination of a point of procedure and practice, leave having been given by your Lordships that it should be dealt with by this House. Two points were originally involved: (1) whether an application in chambers to strike out paragraph 5 of the defendants' defence was properly the subject of such a summons or whether the matter should not have been dealt with by other means, e.g., by an objection taken in the pleadings and by setting down the point for argument under Ord. 25, r. 2; and (2) whether a plea of fair comment is permissible where the facts or, at any rate, the salient facts upon which the comment is made are not set out in the publication complained of. The application to

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[His Lordship stated the facts and continued:] The comment upon these matters is said to be criticism of the way in which the plaintiff's newspapers are conducted and to assert that that conduct is of a low character, that the defendants are entitled to criticize that conduct, and, as it is a matter of public interest, to comment fairly upon it. The plaintiff, on his part, maintains that the right of comment is dependent upon the existence in the words alleged to be libellous of a statement of some fact or facts upon which comment is made so that those reading the comment may be able to judge for themselves whether it is justified or not.

The defendants say that, in a case where the dispute between the opposing sides is one of this nature, an attempt to strike out paragraph 5 of the defence under the rules and orders specified above is not justified. Those rules should, they maintain, be used only in plain and obvious cases: if a serious discussion of legal principles is required, the point at issue should be taken in the pleadings and set down for argument under Ord. 25, r. 2. At the request of both parties, however, the Court of Appeal decided the substantive question as well as that concerned with procedure, and, as they have done so, all your Lordships have thought it proper to determine that matter and have not heard argument upon the technical question as to the propriety of the course adopted. They have assumed that the application to strike out was rightly made and accordingly have confined their consideration to the question of the correctness of the order made by the Court of Appeal in refusing to strike out paragraph 5 of the defence on the ground that no, or no sufficient, statement of the facts on which the comment is made appears in the article complained of.

It is not, as I understand, contended that the words contained in that article are fact and not comment: rather it is alleged that they are comment with no facts to support it. The question for your Lordships' decision is, therefore, whether a plea of fair comment is only permissible where the comment is accompanied by a statement of facts upon which the comment is made and to determine the particularity with which the facts must be stated.

Before one comes to consider the general question it is, I think, desirable to determine what the language of the alleged libel can be held to assert. It may, in my opinion, be construed as containing an inference that the Kemsley Press is of a low and

undesirable quality and that Lord Kemsley is responsible for its tone. Indeed, as I understand the defence and such particulars as have been delivered, an imputation no less severe has been accepted by the defendants as being a true interpretation of the words used.

Although the article complained of uses the phrase "Lower than Kemsley," that language is accompanied by an attack on Lord Beaverbrook's papers, and it is at least arguable that the attack is on the Kemsley Press and not on Lord Kemsley's personal character save in so far as it is exhibited in the press for which he is responsible. Nevertheless, libel must reflect upon a person and Lord Kemsley is held up as worthy of attack on the ground that he is a newspaper proprietor who prostitutes his position by conducting his newspapers or permitting them to be conducted in an undesirable way. In this sense the criticism does not differ from that which takes place when what is called literary criticism comes in question. In such case the attack is not on the personal character of the person libelled, it is upon him as responsible for certain productions, e.g., an article in the press, a book, a musical composition, or an artistic work.

Later, I shall have to come back to the truth and accuracy of this analogy but I have thought it right to set out the basis of literary criticism at this point, because a distinction is sought to be drawn and, indeed, in some of the decided cases, has been drawn between literary criticism and a personal attack upon the character of an individual.

If an author writes a play or a book or a composer composes a musical work, he is submitting that work to the public and thereby inviting comment. Not all the public will see or read or hear it but the work is public in the same sense as a case in the Law Courts is said to be heard in public. In many cases it is not possible for everyone who is interested, to attend a trial, but in so far as there is room for them in the court all are entitled to do so, and the subject-matter upon which comment can be made is indicated to the world at large.

The same observation is true of a newspaper. Whether the criticism is confined to a particular issue or deals with the way in which it is in general conducted, the subject-matter upon which criticism is made has been submitted to the public, though by no means all those to whom the alleged libel has been published will have seen or are likely to see the various issues. Accordingly, its contents and conduct are open to comment on

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the ground that the public have at least the opportunity of ascertaining for themselves the subject-matter upon which the comment is founded. I am assuming that the reference is to a known journal: for the present purpose it is not necessary to consider how far criticism without facts upon which to base it is subject to the same observation in the case of an obscure publication.

A further ground for the distinction sought to be drawn between an attack on an individual and criticism of a literary work appears to suggest that comment upon the literary production must be confined to criticism of it as literature. This is not so; a literary work can be criticized for its treatment of life and morals as freely as it can for bad writing, e.g., it can be criticized as having an immoral tendency. The fairness of the criticism does not depend upon the fact that it is confined to form or literary content.

The question, therefore, in all cases is whether there is a sufficient substratum of fact stated or indicated in the words which are the subject-matter of the action, and I find my view well expressed in the remarks contained in Odgers on Libel and Slander (6th ed., 1929), at p. 166. "Sometimes, however," he says, "it is difficult to distinguish an allegation of fact from an expression of opinion. It often depends on what is stated in the rest of the article. If the defendant accurately states what some public man has really done, and then asserts that 'such conduct is disgraceful,' this is merely the expression of his opinion, his comment on the plaintiff's conduct. So, if without setting it out, he identifies the conduct on which he comments by a clear reference. In either case, the defendant enables his readers to judge for themselves how far his opinion is well founded; and, therefore, what would otherwise have been an allegation of fact becomes merely a comment. But if he asserts that the plaintiff has been guilty of disgraceful conduct, and does not state what that conduct was, this is an allegation of fact for which there is no defence but privilege or truth. The same considerations apply where a defendant has drawn from certain facts an inference derogatory to the plaintiff. If he states the bare inference without the facts on which it is based, such inference will be treated as an allegation of fact. But if he sets out the facts correctly, and then gives his inference, stating it as his inference from those facts, such inference will, as a rule, be deemed a comment. But even in this case the writer must be careful to state the inference as an inference,

" and not to assert it as a new and independent fact; otherwise, his inference will become something more than a comment, and he may be driven to justify it as an allegation of fact."

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But the question whether an inference is a bare inference in this sense must depend upon all the circumstances. Indeed, it was ultimately admitted on behalf of the appellant that the facts necessary to justify comment might be implied from the terms of the impugned article and therefore the inquiry ceases to be—Can the defendant point to definite assertions of fact in the alleged libel upon which the comment is made? and becomes—Is there subject-matter indicated with sufficient clarity to justify comment being made? and was the comment actually made such as an honest, though prejudiced, man might make?

Is there, then, in this case sufficient subject-matter upon which to make comment? In an article which is concerned with what has been described as " the Beaverbrook Press " and which is violently critical of Lord Beaverbrook's newspapers, it is, I think, a reasonable construction of the words " Lower than Kemsley " that the allegation which is made is that the conduct of the Kemsley Press was similar to but not quite so bad as that of the press controlled by Lord Beaverbrook, i.e., it is possibly dishonest, but in any case low. The exact meaning, however, is not, in my opinion, for your Lordships but for the jury. All I desire to say is that there is subject-matter and it is at least arguable that the words directly complained of imply as fact that Lord Kemsley is in control of a number of known newspapers and that the conduct of those newspapers is in question. Had the contention that all the facts justifying the comment must appear in the article been maintainable, the appeal would succeed, but the appellant's representatives did not feel able to and, I think, could not support so wide a contention. The facts, they admitted, might be implied, and the respondents' answer to their contention is: " We have pointed to your press. " It is widely read. Your readers will and the public generally can know at what our criticism is directed. It is not bare comment; it is comment on a well-known matter, much better known, indeed, than a newly printed book or a once-performed play."

One further matter on which some discussion took place does not, in my opinion, directly arise on this appeal, but as it may be raised in interlocutory proceedings later in the course of the action, I think it desirable to express an opinion on it. In a case where the facts are fully set out in the alleged libel, each

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fact must be justified and if the defendant fails to justify one, even if it be comparatively unimportant, he fails in his defence. Does the same principle apply where the facts alleged are found not in the alleged libel but in particulars delivered in the course of the action? In my opinion, it does not. Where the facts are set out in the alleged libel, those to whom it is published can read them and may regard them as facts derogatory to the plaintiff; but where, as here, they are contained only in particulars and are not published to the world at large, they are not the subject-matter of the comment but facts alleged to justify that comment.

In the present case, for instance, the substratum of fact upon which comment is based is that Lord Kemsley is the active proprietor of and responsible for the Kemsley Press. The criticism is that that press is a low one. As I hold, any facts sufficient to justify that statement would entitle the defendants to succeed in a plea of fair comment. Twenty facts might be given in the particulars and only one justified, yet if that one fact were sufficient to support the comment so as to make it fair, a failure to prove the other nineteen would not of necessity defeat the defendants' plea. The protection of the plaintiff in such a case would, in my opinion, be, as it often is in cases of the like kind, the effect which an allegation of a number of facts which cannot be substantiated would have upon the minds of a jury who would be unlikely to believe that the comment was made upon the one fact or was honestly founded upon it and accordingly would find it unfair. It is true that Kennedy J. in *Joynt v. Cycle Trade Publishing Co.*⁴⁴ says that "a comment cannot be fair which is built up on facts which are not truly stated," and in the same case Vaughan Williams L.J.⁴⁵ quotes the language of Crompton J. in *Campbell v. Spottiswoode*⁴⁶: "If he (the critic) . . . imputes to the person whom he is criticizing base and sordid motives which are not warranted by the facts, I cannot think for a moment that because he bona fide believes that he is publishing what is true, that is any defence in point of law." But in each of these cases the court was dealing with the lack of any basis of fact sufficient to warrant the comment made and, in any case, what is fair or unfair comment and what amounts to an imputation of base and sordid motives are matters for the jury and not a subject for your Lordships' decision.

In reaching the conclusion which I have stated I am not conscious of being at variance with the authorities or at any rate

⁴⁴ [1904] 2 K.B. 292, 294.

⁴⁵ *Ibid.* 298.

⁴⁶ (1863) 3 B. & S. 769; 32 L.J. Q.B. 185, 200.

with cases decided in this country. The main support for the appellant's argument is founded upon the observations of Fletcher Moulton L.J. in *Hunt v. Star Newspaper Co. Ltd.*⁴⁷ The observations relied on are: "The law as to fair comment, so far as is material to the present case, stands as follows: In the first place, comment in order to be justifiable as fair comment must appear as comment and must not be so mixed up with the facts that the reader cannot distinguish between what is report and what is comment: see *Andrews v. Chapman*.⁴⁸ The justice of this rule is obvious. If the facts are stated separately and the comment appears as an inference drawn from those facts, any injustice that it might do will be to some extent negatived by the reader seeing the grounds upon which the unfavourable inference is based. But if fact and comment be intermingled so that it is not reasonably clear what portion purports to be inference, he will naturally suppose that the injurious statements are based on adequate grounds known to the writer though not necessarily set out by him. In the one case the insufficiency of the facts to support the inference will lead fair-minded men to reject the inference. In the other case it merely points to the existence of extrinsic facts which the writer considers to warrant the language he uses. . . . In the next place, in order to give room for the plea of fair comment the facts must be truly stated. If the facts upon which the comment purports to be made do not exist the foundation of the plea fails. This has been so frequently laid down authoritatively that I do not need to dwell further upon it: see, for instance, the direction given by Kennedy J. to the jury in *Joynt v. Cycle Trade Publishing Co.*,⁴⁹ which has been frequently approved of by the courts. Finally, comment must not convey imputations of an evil sort except so far as the facts truly stated warrant the imputation." It must be remembered that in that case a jury had found a verdict for the plaintiff. That verdict had been taken upon the general issue and it was not apparent whether in their view the facts were truly stated or not or whether they thought the comment unfair. Lawrance J. had ended his summing up by telling the jury⁵⁰: "If a newspaper publishes exactly what took place with no comment whatever, they would be justified in so doing as a matter of public interest, but if they add to that comment of their own, then the question is whether that comment was bona fide and fair comment, or

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⁴⁷ [1908] 2 K.B. 309, 319-20.⁴⁹ [1904] 2 K.B. 292.⁴⁸ (1853) 3 C. & K. 286.⁵⁰ [1908] 2 K.B. 309, 312-3.

H. L. (E.) “whether it was comment which tended, as alleged here, to charge the plaintiff with improper conduct.”

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Such a charge obviously misstated the elements of fair comment. The facts truly stated might warrant an imputation by an honest man that the plaintiff's conduct was improper and, accordingly, the Court of Appeal sent back the case for a new trial in order that it might be ascertained (1) whether the facts stated were true, and (2) if the comment were such as an honest man might make on those facts. It was in those circumstances that Fletcher Moulton L.J. gave his judgment. He was seeking to distinguish facts from comment and in effect saying that the facts alleged must be such as to warrant an honest man's making the comment complained of. He had not to consider whether the facts must be set out in full or whether a reference to well known or easily ascertainable facts was a sufficient statement of those relied on. In that case the facts were all set out and the only question which the court had to consider was whether, on facts assumed to be truly stated, the comment was honestly made. As the jury had been wrongly directed on this matter, the case was sent back in order that it might be ascertained whether the facts were true and, if true, whether the comment was an honest comment on facts truly stated. The limited measure of the Lord Justice's criticism is to be found in the last sentence which I have quoted, and I should myself accept it as it stands. ~~very~~

I do not think it necessary to go through the other cases one by one, but reference must be made to the South African case of *Roos v. Stent and Pretoria Printing Works Ltd.*⁵¹ If I thought that that judgment represented a new and independent view, it would be necessary to analyse its reasoning carefully. But in truth it is founded on Fletcher Moulton L.J.'s opinion in *Hunt v. Star Newspaper Co. Ltd.*⁵² and does not contain any fresh point of view. It is the only direct decision on the point at issue. Admittedly no English authority determines this question, and for the reasons I have given I am of opinion that in this case a sufficient substratum of fact is to be found in the words complained of, and I would dismiss the appeal with costs.

My Lords, the Lord Chief Justice has not written an opinion in this case, but has asked me to say that he agrees with that which I have delivered.

LORD OAKSEY. My Lords, I agree. The forms in which a comment on a matter of public importance may be framed are

⁵¹ 1909 T.S. 988.

⁵² [1908] 2 K.B. 309.

almost infinitely various and, in my opinion, it is unnecessary that all the facts on which the comment is based should be stated in the libel in order to admit the defence of fair comment. It is not, in my opinion, a matter of importance that the reader should be able to see exactly the grounds of the comment. It is sufficient if the subject which ex hypothesi is of public importance is sufficiently and not incorrectly or untruthfully stated. A comment based on facts untruly stated cannot be fair. What is meant in cases in which it has been said comment to be fair must be on facts truly stated is, I think, that the facts so far as they are stated in the libel must not be untruly stated.

In the present case the word which indicates the subject is "Kemsley" and it must be read in its context, and in that context it must, I think, mean the newspapers controlled by Lord Kemsley—that is the subject-matter of the comment. The comment is that those newspapers are nearly as low as Lord Beaverbrook's newspapers, about which many defamatory statements are made in the alleged libel. It is not, in my opinion, a statement of fact that a newspaper is low: it is a comment. It may be a statement of fact to say that a man is fraudulent, for there is a legal sanction for fraud, but there is no legal sanction for publishing low newspapers. I think, therefore, that the words "lower than" are words of comment and that the particulars which are sought to be struck out were alleged for the purpose of supporting the comment; and if it is proved to the satisfaction of the jury that an honest man might have made such a comment on Lord Kemsley's newspapers, the defence of fair comment will have been established. It is one thing to publish a defamatory statement of fact; it is quite another to allege a defamatory statement of fact in a pleading in order to show that a published comment was fair. A defendant who has made a defamatory comment on a matter of public importance must be entitled to adduce any relevant evidence to show that the comment was fair, and in order to do so must be entitled to allege and attempt to prove facts which he contends justify the comment. Whether the facts alleged are satisfactorily proved or not, it will still be for the jury to say whether they consider that the comment in the circumstances proved might have been made by an honest man.

I am therefore of opinion that the order of the Court of Appeal was right and this appeal should be dismissed.

LORD RADCLIFFE. My Lords, I agree.

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LORD TUCKER. My Lords, I am in complete agreement with the reasons which have been stated by my noble and learned friend on the woolsack in support of the motion to dismiss this appeal.

I also desire expressly to state my concurrence in his opinion that where the facts relied on to justify the comment are contained only in the particulars it is not incumbent on the defendant to prove the truth of every fact so stated in order to establish his plea of fair comment, but that he must establish sufficient facts to support the comment to the satisfaction of the jury.

Appeal dismissed.

Solicitors: *Theodore Goddard & Co. and Deacons & Pritchard; Hale, Ringrose & Morrow.*

[HOUSE OF LORDS.]

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ESTATES CO. APPELLANT;

AND

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GOVERNMENT AND OTHERS RESPONDENTS.

Town and Country Planning—Compulsory purchase order—Land ripe for development—Proposed sale of building site—Price exceeding existing use value—Proposed purchaser to pay development charge—Assignment to him of compensation for loss of development value—Land acquired by Central Land Board for benefit of purchaser—Policy of Board—Validity of order—Acquisition of Land (Authorisation Procedure) Act, 1946 (9 & 10 Geo. 6, c. 49), Sch. I, para. 15—Town and Country Planning Act, 1947 (10 & 11 Geo. 6, c. 51), s. 43 (1), (2)—Town and Country Planning (Development Charge) Regulations, 1948 (S.I. 1948, No. 1139), reg. 2; Sch., para. 1.

By section 43 of the Town and Country Planning Act, 1947:
 “(1) The Central Land Board may, with the approval of the
 “Minister, by agreement acquire land for any purpose connected
 “with the performance of their functions under the following

* *Present:* LORD PORTER, LORD GODDARD, LORD OAKSEY, LORD MACDERMOTT and LORD TUCKER.

“provisions of this Act, and in particular may so acquire any land
 “for the purpose of disposing of it for development for which per-
 “mission has been granted under Part III of this Act on terms
 “inclusive of any development charge payable under those provi-
 “sions in respect of development. (2) If the Minister is satisfied
 “that it is expedient in the public interest that the Board should
 “acquire any land for any such purpose as aforesaid, and that the
 “Board are unable to acquire the land by agreement on reasonable
 “terms, he may authorise the Board to acquire the land compul-
 “sorily in accordance with the provisions of this section . . . (4)
 “Any land acquired by the Central Land Board under the provi-
 “sions of this section shall be disposed of by them in accordance
 “with such directions as may be given to them in that behalf by
 “the Minister, and until the land is so disposed of the Board may
 “manage it in accordance with such directions: Provided that
 “nothing in this section shall be construed as authorising the
 “Board to carry out any development of land acquired by them
 “thereunder.”

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Under the section the Central Land Board have a general power of compulsorily acquiring land “for the purpose of disposing of it
 “for development for which permission has been granted under
 “Part III of this Act on terms inclusive of any development charge
 “payable” and accordingly they may so acquire land, which the
 owner refuses to sell at existing use value to a person who has
 obtained permission to develop it, so that they may dispose of it to
 that person on terms inclusive of the development charge.

Per Lord MacDermott: The second limb of subsection (1) gives
 an instance of the power conferred by the first, but in terms which
 amount to a statutory recognition that the purpose described in the
 second limb is within the scope of the first. Accordingly if a case
 comes within the second limb there is no need, in order to perfect
 the power it purports to confer, to trace a connexion between the
 purpose therein mentioned and the performance of some function
 of the Board.

Decision of the Court of Appeal (sub nom. *Earl Fitzwilliam's
 Wentworth Estates Co. v. Minister of Town and Country Planning*)
 [1951] 2 K.B. 284 affirmed.

APPEAL from the Court of Appeal (Somervell and Singleton
 L.J.J., Denning L.J. dissenting).

The facts were stated in paragraphs 6 to 19 of the appellant's
 printed case as follows:—

“6. The appellant is the owner of large estates in Ecclesall
 “in the city of Sheffield. It and its predecessors in title have
 “been developing these estates for over 30 years by leasing plots
 “of land for 300 years on building leases.

“7. In August, 1948, a Mr. C. N. Rodgers approached the
 “surveyors to the appellant, through his architect, a Mr. A.
 “Lusby, for a long lease of a plot of land at Whirlow Lane,

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“ Sheffield, upon which to build a house. He was informed that
 “ he could have a lease of a plot for a term of 300 years at an
 “ annual rent of £20 10s. 0d. and the assignment of the benefit
 “ of the appellant's claim in respect of that plot upon the sum of
 “ £300,000,000 from which payments in respect of the deprecia-
 “ tion of land values are to be made under Part VI of the [Town
 “ and Country Planning] Act [1947], on condition that he paid
 “ any development charge levied under Part VII of the Act. On
 “ August 16, 1948, Mr. Rodgers obtained a grant of planning
 “ permission under Part III of the Act to build a house upon the
 “ said plot of land.

“ 8. On October 7, 1948, Mr. Lusby, on behalf of Mr. Rodgers,
 “ wrote to the Central Land Board a letter calling their attention
 “ to the fact that the appellant did not propose to lease the plot
 “ save at a rent which exceeded its existing use value. He
 “ requested the Board to make a compulsory purchase order or
 “ lease for the benefit of his client.

“ 9. On November 1, 1948, the secretary to the Central Land
 “ Board wrote to the surveyors to the appellant, enclosing a
 “ pamphlet issued by the Board and entitled ‘ House 1,’ and
 “ asking whether the appellant was prepared to adopt in regard
 “ to the said plot of land one of the three alternative methods
 “ (and, if so, which) set out in the pamphlet. The three methods
 “ were, briefly: (A) To sell at existing use value, leaving the
 “ buyer to pay the development charge. (B) To accept liability
 “ to pay the development charge and to sell at a fair price
 “ including that charge. (C) To pay the development charge,
 “ build the house, and then sell the house and land at a fair
 “ price including that charge.

“ 10. On November 5, 1948, the surveyors to the appellant
 “ replied to the Central Land Board stating that the appellant was
 “ not disposed to adopt any of the three methods recommended
 “ by the Board.

“ 11. On November 15, 1948, the Central Land Board wrote
 “ to the Sheffield City Council to ascertain whether it was, in the
 “ opinion of the Council, expedient in the public interest that
 “ certain sites, including the plot at Whirlow Lane, should be
 “ acquired and made available for housing development. On
 “ December 4, 1948, the Town Clerk to the Sheffield City Council
 “ replied stating that in the opinion of the Council it was in the
 “ public interest that the sites should be made immediately
 “ available for housing development. A report from the City
 “ Engineer was enclosed with this letter.

" 12. On December 23, 1948, the Central Land Board again wrote to the surveyors to the appellant stating that the approved development of the said plot might be hindered, if not prevented, unless it was made available and that the district valuer had therefore been requested urgently to negotiate for the immediate purchase of the plot on the basis of existing use value provided by section 51 of the Act, which basis the Board considered to be the reasonable terms referred to in subsection (2) of section 43 of the Act.

" 13. On December 30, 1948, heads of agreement were sent to Mr. Rodgers by the appellant. They included the terms described in paragraph 7 hereof.

" 14. On January 7, 1949, the district valuer wrote to the surveyors to the appellant asking for information upon which to negotiate the acquisition of the plot. . . . Negotiations between Mr. Rodgers and the appellant continued but finally broke down, with the result that on March 3, 1949, the district valuer again wrote to the surveyors to the appellant asking for information upon which to negotiate the acquisition of the plot. The surveyors to the appellant replied on March 21, 1949, that they recommended a price of £462 for the acquisition.

" 15. On May 13, 1949, the Central Land Board passed a resolution to the effect that it was desirable to acquire the plot for the purpose of disposing of it for development for which planning permission had been granted on terms inclusive of any development charge payable in respect of the development, and that the plot should be acquired compulsorily since the Board were unable to acquire the plot by agreement on reasonable terms.

" 16. The Central Land Board then purported to make an order on June 22, 1949, authorizing them to purchase the plot compulsorily for the purpose of disposing of it in accordance with the words of their said resolution.

" 17. On July 20, 1949, the appellant made an objection to the confirmation of the order on the grounds:—(i) That the order was ultra vires in that it had been made to secure an object which was not within the Board's powers to achieve, namely, that the appellant should bear the loss resulting from the vesting of development rights in the State by virtue of the Town and Country Planning Act, 1947, and that it should not be permitted to make it a condition of sale that the purchaser should stand in its shoes. (ii) That it was not expedient in the public interest that the Board should acquire the plot.

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" lease the plot were reasonable.

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" 18. On August 30, 1949, a public local inquiry was con-
" ducted at Sheffield by Mr. Fitzgibbon, an Inspector of the
" Ministry of Town and Country Planning. On December 3,
" 1949, the Minister confirmed the compulsory purchase order
" and recited that he was satisfied that it was expedient in the
" public interest that the Board should acquire the plot and that
" the Board were unable to acquire it by agreement on reasonable
" terms.

" 19. On February 10, 1950, by virtue of the provisions of
" para. 15 of Sch. IV to the Acquisition of Land (Authorisation
" Procedure) Act, 1946, the appellant gave notice of motion to
" challenge the validity of the compulsory purchase and confirma-
" tion orders on the grounds:—(i) That the compulsory purchase
" order had been made for a collateral purpose, namely, to
" enforce the policy of the Central Land Board set forth by them
" in their pamphlet 'House 1'; and (ii) That the Board in
" making the order and the Minister in confirming it had taken
" into consideration and been influenced by extraneous matters,
" namely, the Board's policy set forth in pamphlet 'House 1,'
" which policy was unlawfully directed to preventing landowners
" from making it a condition of a sale or long lease of land that
" the purchaser or lessee should stand in the owner's shoes
" and accept the risk of not receiving a payment from the
" £300,000,000 under Part VI of the Town and Country Plan-
" ning Act, 1947, equivalent to the full development value of the
" land which value had become vested in the State."

There was evidence in an affidavit by Sir William Fraser, deputy chairman and secretary of the Central Land Board, that the appellant was not willing to sell the land for less than £462 and that the district valuer estimated that the cost of compulsorily acquiring the freehold on the basis of Part V of the Act of 1947 was about £35. There was exhibited to his affidavit the resolution of the Board of May 13, 1949: "That it was desirable
" to acquire the land in Whirlow Lane, Sheffield (Appendix A),
" for the purpose of disposing of it for development for which
" planning permission has been granted on terms inclusive of
" any development charge payable in respect of that develop-
" ment, and that, as the Board were unable to acquire the said
" land by agreement on reasonable terms, an order be made to
" acquire the land compulsorily." (Appendix A described the land.)

The King's Bench Division (Birkett J.) made an order on July 31, 1950, dismissing the motion. The Court of Appeal on April 13, 1951, affirmed his decision. The appellant appealed to the House of Lords. The respondents were the Minister of Housing and Local Government and the Central Land Board. (By the Transfer of Functions (Minister of Health and Minister of Local Government and Planning) (No. 1) Order, 1951 (S.I. 1951, No. 142), the style of Minister of Town and Country Planning was changed to Minister of Local Government and Planning. By the Ministers of the Crown (Transfer of Functions) Order, 1951 (S.I. 1951, No. 1900), the style of Minister of Local Government and Planning was changed to Minister of Housing and Local Government.)

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Simon K.C. and *J. H. Barrington* for the appellant. The question depends on the construction of section 43 of the Town and Country Planning Act, 1947. It is whether a separate and independent power is conferred by the second limb of section 43 (1). The normal meaning of the phrase "in particular" is to indicate a specific instance of a general power already given, a part of a whole. It does not go outside the scope of what has already been stated. This is in accordance with the definition of "particular" in the Oxford English Dictionary: "Belonging to "or affecting a part, not the whole, of something." Thus the second limb only particularizes something within the general terms of the first limb, so that before any power arises under either limb the words "for any purpose connected with the performance of their functions" must be satisfied. Thus, in a case falling within the second limb, the Board have no power of acquisition if the purpose is not in fact so "connected with the performance of their functions." In the present case this requirement is not satisfied. If there is any ambiguity in section 43 as to whether the second limb confers a separate and independent power it ought to be construed strictly, and any assumption required should be made in favour of the subject because the Act is confiscatory and restrictive of the rights of the subject. It should also be construed so as not to conflict with section 64 (2), which expressly permits the unfettered assignment of the right to receive any payment under a scheme made under Part VI of the Act for loss of development value.

The functions of the Central Land Board which would require a power of compulsory acquisition are to test the market price of land so as to help them to ascertain development values (see

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section 61), to fix and collect development charges (see section 69), and to collect information for the purposes of section 70. The functions of the Board are discussed by Denning L.J.¹ These functions are purely fiscal and financial. Under Parts V and VI of the Act the only task of the Board is to determine the sums payable as development charges and collect them. It is not a function of the Board to promote development in the interests of planning in a particular area. That is a matter for the planning authority and the local authority. It is not a function of the Board to secure the erection of houses. That is a matter for the Minister of Housing and Local Government, and was formerly for the Minister of Health (see Housing Act, 1936; s. 73, and Housing Act, 1949, ss. 1 and 9). It is not a function of the Board to prevent sales at a price greater than the existing use value, nor is it a function of anyone else under the Act, which does not prohibit such sales. Parliament could have made this an offence but it did not do so (*cf.* Building Materials and Housing Act, 1945, s. 7). The Act of 1947 does create offences, but not this particular offence (*cf.* section 74 (3)).

Although the functions of the Board include the assessment and collection of development charges, the Act does not authorize them to take any action where the collection of the charge or the working of the development charge scheme is likely to be impeded by a landowner seeking to obtain a price in excess of existing use value. There is no distinction in principle between an owner who refuses to sell save at a price above that which the Board might regard as existing use value and an owner refusing to sell at all for personal reasons. The Act stipulates, in effect, that where a government department acquires land by compulsory purchase the basis of compensation shall be the existing use value (see section 51, although the actual expression "existing use value" is not employed there or indeed anywhere in the Act). But there is in the Act no regulation of sales or leases of land between private persons, who are left with their previous freedom of contract. Further, there is nothing in the Act which lays it down that the development charge shall be assessed at 100 per cent., and only such an assessment would make a sale at the existing use value a reasonable proposition; since if the development charge was assessed at less, the landowner, on the respondents' argument, might be forced to sell at its existing use value, while the purchaser would get part of its development value without paying for it.

¹ [1951] 2 K.B. 284, 304-6.

The power in section 43 (1) may have been connected with section 71 and may have been created to give the Board the opportunity of enforcing its security in the event of the whole development charge not being paid.

The sole, or at any rate the dominant, motive of the respondents was to enforce compliance with the Board's policy set forth in their pamphlet "House 1." At the very least it was a substantial consideration in their minds. The court must have regard to the dominant purpose or motive because human beings act habitually from mixed motives and for more than one purpose, and regard must be had to the facts of human nature. It was ultra vires, unlawful and improper for the respondents to act from this motive and they were misguided, though not consciously unfair. The Board cannot use their compulsory powers of acquisition to enforce sales at existing use value. To do so would be to go beyond the provisions of the Act. The suggestion of the respondents that this is one of their functions is in conflict with section 64 (2).

It is said by the respondents that sales above existing use value would impede the Board in collecting development charges and that therefore it is a function of the Board to prevent this as part of its fiscal functions. This amounts to a claim by a fiscal body to advance by compulsion the happening of the event which makes the charge payable. They claim to be empowered to ensure that development shall take place at an early time when they choose and not when the landowner reaches an agreement with the purchaser. But the Board cannot use their powers of compulsory purchase to ensure that they shall be able to collect the development charge. The Board of Customs and Excise cannot collect dues unless imports are made, but it is not part of their function to advance money to establish an import agency. Further, on the respondents' argument, even if development was not impeded it would still be open to the Central Land Board to make compulsory purchases because this would be connected with their functions. In fact, however, the collection of development charges and the working of the development charge scheme cannot be impeded by the landowner seeking to obtain a price in excess of the existing use value. It does not appear that it was impeded here because there is no evidence that a purchaser would not have been found to buy at the appellant's price so that a development charge would have been payable.

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*Point of Ayr Collieries Ltd. v. Lloyd-George*² is not relevant to this case. Merely for the Minister to be satisfied that the act is in the public interest is immaterial. In the present case the Minister did not purport to be satisfied that the land was to be acquired for any purpose connected with the Board's functions, and he did not address his mind to the first limb of section 43 (1). In any event, it was not within his ambit to be satisfied that this was within the Board's functions. If the compulsory purchase order was ultra vires nothing the Minister could do could make it good.

[They also referred to *Reg. v. Wimbledon Local Board*³; *Travis v. Minister of Local Government and Planning*⁴; *Galloway v. London Corporation*⁵; *Sydney Municipal Council v. Campbell*⁶; *Rex v. Paddington and St. Marylebone Rent Tribunal*⁷; *Crofter Hand Woven Harris Tweed Co. Ltd. v. Veitch*⁸; *James v. Cowan*⁹; the Acquisition of Land (Assessment of Compensation) Act, 1919, s. 2; the Town and Country Planning (Development Charge) Regulations, 1948 (S.I. 1948, No. 1189); and sections 20 (4), 58 (1), 69 (1) and 70 (2) of the Act of 1947.]

J. H. Barrington following. Sales above existing use value cannot impede the collection of development charges by the fact (as suggested by the Court of Appeal) that the purchaser would object to paying for the same thing twice over. The Board have legal remedies for collecting development charges without resorting to section 43. The suggested connexion between their power under that section and their function of collecting development charges is too remote for the law to take into account.

The power of compulsory purchase under section 43 of the Act can only be used in circumstances in which the Board could acquire land by agreement under that section and therefore ex hypothesi not in order to prevent a landowner asking what the Board consider too high a price. In section 43 (2) the words "for any such purpose as aforesaid" are used, and under subsection (1) that purpose must be "connected with the performance of their functions." Now the word "purpose" in that subsection must be interpreted in the context of the subsection only, and that subsection envisages acquisition by agreement

² [1943] 2 All E.R. 546, 547.

³ (1882) 8 Q.B.D. 459, 464.

⁴ [1951] 2 K.B. 956, 960-1.

⁵ (1866) L.R. 1 H.L. 34.

⁶ [1925] A.C. 338.

⁷ [1949] 1 K.B. 666, 678-9.

⁸ [1942] A.C. 435, 438, 444, 452, 469, 478, 489.

⁹ [1932] A.C. 542, 556-7.

only. The respondents in the present case are making two assumptions: (a) They assume that the power which they are going to exercise is connected with the performance of their functions under the Act; (b) the only suggested connexion is that sales above existing use value would impede the collection of development charges. The power under subsection (2) arises on failure to acquire land by agreement, and on the respondents' argument one must suppose the possibility of a landowner agreeing to sell land to do harm to himself since it contemplates a landowner being asked to agree to sell land to the Board for the purpose of preventing him from selling it at a higher price to a specific third party with whom he is in negotiation.

Sir Hartley Shawcross K.C., J. P. Ashworth and R. J. Parker for the respondents. The compulsory purchase order and the confirmation order were both valid.

On the facts the Board, who are in good faith, have purported to do exactly what under the second limb of section 43 (1) (whether or not it be regarded as separate from the first) they are entitled to do. It is for the appellant to show that the Board, in acquiring the land to sell as they intended, were not within their function. This it has not done. It is not suggested that it is illegal for a landowner to sell above existing use value. If several persons were bidding at an auction for a piece of land, that would put up the value. But to say that a thing is not illegal is not the same thing as saying that it is not contrary to the fiscal and general policy of the Act. There is no dichotomy between the functions of the Board and the "House 1" policy. The latter is a corollary of the former, and is connected with them.

The end to be accomplished is the charging and collection of development charges (which were first intended to balance the compensation payable to landowners for loss of development rights and also to secure the rise in land values for the State). Anything which helped the Board to collect development charges would be connected with its functions. If the imposition of development charges were superimposed on sales at full development value, that might result in stagnation of development because people could not afford it, and the Act has provided two methods to counter this and to encourage development. What stops development stops the collection of development charges. To encourage development the Board, in deciding what, if any, charge was to be paid, might charge the full development value

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H. L. (E.) 1951 less some sum (£x minus £y). It is against this general background that its powers must be considered.

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The "House 1" policy is not a question of some socially commendable theory existing in vacuo. It is connected with the Board's undoubted functions in that if the procedures which it recommends are not followed the undoubted functions of the Board will be affected, in particular the function of assessing and collecting the development charge. The Board has an indirect but real interest on behalf of the State in seeing that development takes place. Even if the Board is concerned purely fiscally, and not socially, it exists to promote the circumstances in which revenue may be collected just as rating authorities do their best to promote the occupation of hereditaments within their area. All the respondents need show is that what the Board propose to do is "connected with the performance of their functions."

An owner of land like the appellant has no development right to sell to anyone. He is left with nothing at all to sell but the restricted use of the land without planning permission. If he tries to sell more he is seeking to be paid twice for the same thing. Once the Act comes into force no one can sell save on the basis that the land is restricted to its existing use. It is to be noted that the compensation for loss of development value paid to landowners will not be at the rate of 100 per cent. and so if a landowner sells his right to compensation at 100 per cent. he is selling it for more than he could get from the State. It is true, however, that so far as the criminal law is concerned he can sell for any price he likes. But once one got prices for land being consistently charged above existing use value artificial values would be created, artificially inflating the existing use value, for such sales would tend in the long run to alter that value by raising the floor of the existing use value nearer the ceiling of the unrestricted value. An extreme example of the difference would be a clear bomb site in the City of London used only for keeping chickens; the existing use value would be very small but the unrestricted value would be enormous. The effect of sales above existing use value would be to diminish the development charge payable to the State. If the three alternative procedures in "House 1" are not followed the existing use value will become inflated and it will be hard to assess it. The Board is entitled to step in and buy so as to prevent values becoming quite unreal. In the present case Rodgers would not have bought on the terms of the appellant and the Board would have been deprived of the chance of collecting development

charges from him. It is an attempt to get more than the existing use value from him because he has got a licence to build by reason of his particular need. Planning is not based on the needs of a particular individual, but the granting of a licence is so based, and here the appellant is trying to take advantage of the personal position of the proposed purchaser to charge more than the existing use value. If any assumption is to be made in this case, it must be that there is no other purchaser than Rodgers in the market and that but for the Board's intervention the sale would have gone off. This is a case of purchase by the Board for the purpose of assisting the collection of the development charge.

As for the motive of the Board, it would be hard for the courts to explore their motives; it is not a matter for the courts but rather for Parliamentary control. In the exercise of statutory powers there must always be some collateral purpose because they are always exercised for some reason, but the judge of its propriety is the Minister. Nor will the court inquire into the grounds which led the Minister to his conclusion unless his bona fides is challenged. The conclusion of the Minister is final as to whether this purchase is within the functions of the Board. See also Acquisition of Land (Authorisation Procedure) Act, 1946, Sch. I, Pt. IV; *Point of Ayr Collieries v. Lloyd-George*¹⁰ and *Liversidge v. Anderson*.¹¹

On the true construction of section 43 (1) of the Act of 1947 the second limb gives an instance of the power conferred by the first. The terms amount to a statutory recognition that the purpose described in the second limb is within the scope of the first. Therefore, since the present case falls within the wording of the second limb it is unnecessary to trace a connexion between the purpose mentioned therein and the performance of some function by the Board. The word "so" refers back to the phrase "with the approval of the Minister." It would be extraordinary if the only purpose for which Parliament intended to give the power was the purpose of testing the market. The second limb adds nothing to the construction of the first limb. Alternatively, the second limb confers a separate and distinct power entirely independent of that contained in the first. The words "in particular" are only intended as emphasis and do not indicate an example of the power conferred by the first limb.

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¹⁰ [1943] 2 All E.R. 546.¹¹ [1942] A.C. 206.

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Even assuming the narrowest construction of section 43 (1), the evidence is that the Board and the Minister acted for a purpose which on the face of it is good, though it may not constitute their whole purpose. In that case the ordinary presumption must apply that everything is rightly and properly done unless the contrary is established. It must be presumed that the Minister and the Board acted within their powers in doing that which the Act authorized them to do. What they did was "connected with" the performance of their functions. Those functions and the matters connected with them are wide. Anything tending to reduce the amount of the development charge or to make its collection and assessment more difficult is connected with the Board's functions. *Crofter Hand Woven Harris Tweed Co. Ltd. v. Veitch*¹² and *Sydney Municipal Council v. Campbell*,¹³ relied on by the appellant, are very different from the present case. [They also referred to *Travis v. Minister of Local Government and Planning*¹⁴ and to sections 5 (2), 12, 23 (2), 43 (4), 54 (4) (a), 58 and 69 of the Act of 1947.]

John Ashworth following. Section 43 of the Act of 1947, which deals with the acquisition of land by the Central Land Board, is in Part IV of the Act and is in the group of sections dealing with "Acquisition and disposal of land for planning purposes." By section 43 (1) the Board "may so acquire land "for the purpose of disposing of it for development," and the subsection gives a twofold enabling power of acquisition, though not for twofold purposes. The disposal under the second limb of the subsection is something that one would expect to take place because "permission has been granted." There are different examples of the use of the expression "in particular" in the Act: (a) "in particular but without prejudice to the "generality of this section" (section 101 (1)); (b) "in particular "any such notice" (section 23 (2)); (c) "in particular" used alone (section 14 (3)); (d) "in particular" as used in section 43 (1). The first does not assist the contentions of either the appellant or the respondents. The second is a case of giving a specific instance of the broad generality which has preceded it. In the third case there are given particular instances of the provisions that can be made for dealing with applications for permission to develop land. "In particular" can be a link

¹² [1942] A.C. 435.

¹⁴ [1951] 2 K.B. 956.

¹³ [1925] A.C. 338.

between what follows and what has gone before, as can words like "such" or "so." Yet when you get "in particular" used as it is in section 43 there is a marked distinction in its use. It is a natural word for emphasis and there it does not indicate an example of the power already conferred. The expression is put in to make it clear that there are two powers. The words "may so acquire" would be unnecessary if the subsection was meant to confer only one power for a variety of purposes. The word "include" may enlarge or add to the natural significance of words or expressions in a statute: see *Dilworth v. Commissioners of Stamps*.¹⁵

Simon K.C. in reply. The questions are: (a) Does the second limb of section 43 (1) create a separate and independent power? (b) Are sales above existing use value contrary to the spirit of the Act and do they impede development? (c) Is it a function of the Board to prevent such sales? (d) Does the satisfaction of the Minister conclude the matter? The answer to all these questions is in the negative.

It is not part of the function and the fiscal duties of the Board to hasten development. Rating authorities have not the function to open a letting agency, nor is it part of the function of the Inland Revenue Commissioners to set people to work in order that they may earn income and pay tax. The fiscal functions of the Board only arise after development has taken place. Development is only a *causa sine qua non* of the right to collect the development charge, and it is of the essence of a *causa sine qua non* that it is not "connected with" the ensuing event.

The right given to landowners by section 64 (2) shows that the respondents' contention is wrong. It is not true that a landowner has nothing to sell but the existing use value of the land. He has his claim on the central land fund. There is also amenity value and possibly sentimental value.

If the policy of the Act is as alleged by the respondents it is strange that it does not appear in the long title of the Act. There are no words in the Act to say that in the case of private purchases sales shall not take place at a price above existing use value, and it cannot be the policy of the Act. Even if such sales are contrary to the spirit of the Act they are not illegal, though the legislature could have made them so (*cf.* the Rent Restriction Acts). The development charge need not necessarily be 100 per cent., and only if it is so can it be relevant whether

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¹⁵ [1899] A.C. 99, 105-6.

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the existing use value is the price at which the land changes hands. A market depends on the existence of a vendor who is willing to sell and a purchaser who is willing to buy. Sales above existing use value may make a purchaser less willing to buy, but they make a vendor more willing to sell. Ultimately a market price is arrived at, dependent on the supply of and demand for land existing at the time. This, however, does not affect the Board. In making his decision what to pay a vendor a purchaser can ascertain in advance what is the amount of the development charge (see section 70).

One does not impede the collection of the development charge only by asking a price higher than a purchaser will pay. One can stop it equally well by refusing to sell at all, but it would be ultra vires the Board to force a landowner to sell when he was refusing to do so: see *Travis v. Minister of Local Government and Planning*.¹⁶ There is no logical distinction between the two so far as development is concerned. Even assuming, however, that it is a function of the Board to prevent the impeding of sales, there is no evidence that the sale to Rodgers was in fact impeded.

The decision of the Minister is not final and conclusive as to whether this matter is within the functions of the Board. It is only conclusive on the question, if it arises, whether an act is within the public interest. But the act as to which the satisfaction of the Minister is conclusive must itself be within the four corners of the Act. The court will examine the purpose for which such an act as this was done, and will take cognizance of mixed motives: see *Sydney Municipal Council v. Campbell*¹⁷ and *Crofter Hand Woven Harris Tweed Co. Ltd. v. Veitch*.¹⁸

The main purpose for which the Board is given this power is to test the market. Since land will change hands at prices other than the full development value the Board will in the future have to test the market to fulfil their functions under section 70. They will accordingly go into the market and buy at the existing use value and sell afterwards at the full development value.

It is proper also for them to enforce a security which has been taken, when they can enter on the land of a man who has failed to pay a development charge and may acquire it and sell it (see section 70).

Any ambiguity in the Act should be resolved in favour of the

¹⁶ [1951] 2 K.B. 956.

¹⁸ [1942] A.C. 435.

¹⁷ [1925] A.C. 338.

subject and any necessary assumptions should be made in his favour. [He referred to Town and Country Planning (Development Charge) Regulations, 1948, Sch., para. 1.]

Their Lordships took time for consideration.

1952. Feb. 25. LORD PORTER. My Lords, the question for your Lordships' consideration is whether, on the true interpretation of section 43 of the Town and Country Planning Act, 1947, and in the circumstances hereinafter described, the Central Land Board validly made an order, and were validly authorized by the Minister, to acquire compulsorily under that section a plot of land belonging to the appellant, which the appellant intended to lease for building purposes at a rent in excess of what would be commensurate with its existing use value. The facts are not in dispute and are shortly and accurately set out in the appellant's case.

The Board say that their action is taken in exact accordance with the terms of the Act in that they were unable to acquire the land by agreement on reasonable terms and that they therefore acquired it compulsorily for a purpose connected with the performance of their functions under the following provisions of the Act, and in particular for the purpose of disposing of it for development for which permission has been granted.

This contention gives rise to two considerations: (1) What is the standard by which "reasonable terms" are to be determined? (2) Can the Board acquire land compulsorily for the purpose of disposing of it simpliciter or is any limit set to their powers, *i.e.*, is their only right to acquire it where their object is to fulfil one of the functions under the subsequent provisions of the Act and, if so, what are those functions?

The first question is not seriously in dispute. There was evidence in an affidavit by Sir William Fraser on behalf of the respondents that the appellant was not willing to sell his land for less than £462 and that the district valuer, on the basis of Part V of the Act, estimated its value to be about £35. Indeed, the fact that the appellant's terms, whether for letting or sale, always exceeded the existing use value was not disputed by the appellant; a rent of £20 10s. 0d. and a liability for development charge, even though a claim on the £300,000,000 fund was assigned, is obviously in excess of the existing use value.

The second question gives rise to more difficulty. On the motion to quash the order and the confirmation of it by the

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Minister the appellant contended: (1) that the orders had been made by the Board for a collateral purpose, namely, to enforce the policy of the Board set out in the pamphlet "House 1" and to prohibit any other method of dealing with the land; and (2) that the Board and the Minister, in exercising their statutory discretions, had taken into consideration and been influenced by extraneous matters, namely, the policy set forth in "House 1." The honesty of the Minister or of the Board was not challenged. They were misguided, it was said, but not consciously unfair.

If these contentions are to succeed it must be inferred that the Board did not concern themselves with the particular facts of the case, but were minded to carry out a policy which they had adopted whatever the circumstances might be. I see no evidence to this effect: The suggestion is purely speculative and is not borne out by any of the documents produced.

But the appellants put their case in another and more persuasive way. The functions of the Board, they say, are financial; the planning authority is the local authority in whose hands are placed the task of determining how development shall be planned. The Board's only task is to determine the sums payable as development charges and to collect them. See Parts VI and VII of the Act.

The contention has some force but is not determinative of the case. It would have been possible so to limit the powers of the Board that they should have authority only for the direct performance of the function of assessment and collection, but the Act has not done so: it has given them certain collateral powers of which those contained in section 43 are an example. I should myself be inclined to hold that even without the specific permission contained in the first subsection the Board, under their financial powers, are entitled to acquire land compulsorily in order to enable them to assess and collect the development charge, but am of opinion that in case this construction should be subject to any doubt the fact that they are so entitled is expressly provided by the second half of the subsection. As I understand his judgment, Birkett J. relied upon that half as decisive of the case. In his opinion it conferred a second and independent power upon the Board quite irrespective of their other powers and functions. On the other hand, the majority of the Court of Appeal took the view that the second half did not confer a separate power but was interpretative of the general powers contained in the first half. This view, which was

expressed by Somervell and Singleton L.JJ., adopts, I think, a correct construction of the wording of the section.

If the view that the function of the Board was limited to finance and nothing else were to prevail, it is difficult to see any reason for giving them the compulsory powers contained in section 43 (4) and, in particular, power to take over land. Jurisdiction to take over land, given, as it is, in direct terms, must be connected with some of the Board's functions and it must therefore either be a direct and separate power or be given to assist in assessing and collecting development charges. It was, indeed, suggested that its object was to enable the Board to test the market in order to assist them in determining the proper amount of the development charge or to help them to collect it. Either suggestion is, in my opinion, remote from reality; there must be ample opportunity of calculating value from other sales.

In default of other reasons for the power given, the natural explanation is that it was given to enable them to perform their functions as assessors and collectors of the development charge. It was said, however, that so to decide was contradictory of the provision in section 64 (2) which makes the right to receive any compensation for loss of development value transmissible by assignment or by operation of law. This provision was, I think, natural in the case of a new charge for which some compensation was to be given. It was desired to make it clear that the compensation was not personal to one who was the owner at the appointed day but was transmissible by or from him. It is in fact transmissible in all cases except as part of the consideration given to the purchaser of the land in exchange for an undertaking to pay the development charge. The limitation upon transmission imposed by the exception does not conflict with the provisions of the subsection. It merely ensures that the right to transmit the compensation shall not be used to increase the price charged for the interest assigned to a sum greater than the present use value of that interest.

The point is a new one and I do not get any assistance from the cases cited to your Lordships. I would dismiss the appeal with costs.

LORD GODDARD. My Lords, the question which falls for decision in this case in the main depends upon the true construction of section 43 of the Town and Country Planning Act, 1947. In my opinion that section confers a single power on the Central Land Board and not two powers. They have power to acquire

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land for a purpose connected with the performance of their functions and the words which have been described throughout the argument as the second limb of the section in my opinion are no more than a particular instance of that which the legislature regarded as part of the Board's functions. It would seem that in this case the Board have acted in accordance with the clear words of the statute. The land which they have acquired was land for which permission for development had been granted and they acquired the land for the purpose of disposing of it on terms inclusive of the development charge. They disposed of it to a person to whom permission to develop had been granted but although the section does not say that they must dispose of it to such a person it can in my opinion make no difference that that person is also one who has received permission to develop. The appellant's argument, however, is based on the contention that the Board has nothing to do with development and that their functions are purely fiscal. The Board, on the other hand, contend that this power is given to them for the purpose of facilitating the collection of the development charge. If it is not given to them for that purpose, I have great difficulty in seeing the reason for giving them power to acquire land. I cannot agree that Parliament could have intended to confer this power of compulsory purchase on the Board merely for the purpose of enabling them to test the market. That they could use the power for this purpose may be true, though I should think it highly unlikely that they would ever do so, and equally I think it would be most unlikely that Parliament would confer on them or the Minister powers of compulsory purchase merely to achieve such an object. Nor again can I think that this power was conferred for the purpose of enabling them to realize a security that may have been taken for development charge. It is, I think, of great significance that the only land that they can acquire is land for which permission to develop has been granted. One of the duties of the Board is to collect the development charge for the purpose of providing funds for the payment of compensation to landowners who have been obliged to part with the development value to the State. If, therefore, permission has been given by the appropriate authority to develop land which it is in the public interest should be developed and a landowner is unwilling to sell at the existing use value it follows that the Board would be unable to collect the development charge which would otherwise become payable. A would-be purchaser cannot obtain compulsory powers of purchase. It

appears to me, therefore, that Parliament intended to give to the Central Land Board, if they obtain the permission of the Minister, the power to acquire the land themselves, so that they may dispose of it at a price which will include the development charge from a purchaser who is willing to carry out the development, and thus to collect the appropriate sum.

A further objection which was taken by the appellant was that by their action the Board are preventing the assignment by the landowner of his right to receive the compensation to which he may become entitled. I am unable to agree with this contention. The landowner has, no doubt, the right to participate in the compensation fund, and he can still assign that right as he can assign any other chose in action. The only thing that he cannot do is to assign the right to a purchaser as part of the consideration of the purchase, but for all other purposes his right to assign remains and, after all, this is a mere temporary provision as the compensation money is to be paid in 1953, after which there will be nothing to assign. But it was said that the real object of the action of the Central Land Board was to enforce a policy whereby all sales of land would have to take place at existing use values, and it is said that that is going beyond the provisions of the Act as, if this had been the intention of Parliament, it would have been quite easy to provide in the Act that land should henceforth be sold only at that value. In my opinion it cannot be said that though it may well be, as I think it was, the desire of the Board that sales should take place at existing use value, this would make the exercise of the power given to them ultra vires.

For the reasons I have expressed above I think it clear that the action of the Board in these or similar circumstances does facilitate the collection of the development charge, and we have here a case in which the landowner was endeavouring to obtain ground rent of an amount in excess of what could have been obtained if existing use value should be the governing consideration. I do not think we need consider whether the intending purchaser might, had the Board not intervened, have still been willing to take a lease on the proposed terms. I think it is pretty clear in fact that he would not, but I do not find anything in the section which prevents the Central Land Board exercising the express power which is given to them if they and the Minister think it is in the public interest so to do, and accordingly I would dismiss the appeal.

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LORD OAKSEY. My Lords, I agree. In my opinion the purpose referred to in the second part of section 43 (1) of the Town and Country Planning Act, 1947, is a "purpose connected" with the performance of their functions by the Central Land Board within the meaning of the first part of that subsection.

Express power is given to the Board by the subsection to acquire land for the purpose of disposing of it for development for which permission has been granted on terms inclusive of any development charge. It is conceded by the appellant that the functions of the Board include the duty to assess and collect development charges, and it appears to me that the power to acquire land for the purpose of disposing of it on terms inclusive of any development charge is clearly a purpose connected with the performance of these functions.

Mr. Simon has argued on behalf of the appellant that the advice of the Central Land Board, contained in the document headed "House 1," and the correspondence between the Board and the appellant's agents show that the Board exercised their powers for the purpose of preventing the appellant obtaining more than the existing use value of the land in question, and that there is nothing in the Act to prohibit a sale at such a value. It is true that there is nothing in the Act to prohibit sales at such values, but the express power to acquire land compulsorily for which permission to develop has been granted is inconsistent with a right by the landowner to sell at all in the particular class of cases dealt with.

It was further argued on behalf of the appellant that section 64 (2) of the Act, which provides that the right to receive payment from the sum payable for depreciation of land values shall be transmissible by assignment, was limited by the construction sought to be placed upon section 43, because the landowner could not transmit his right to payment as a term of the agreement to sell the property in respect of which his right to payment arose, but, in my opinion, the right to payment remained transmissible within the meaning of section 64, and such a limitation is no ground for placing a different interpretation on section 43.

It was also argued that if the development charge could be assessed at less than its full value the landowner would have been forced to sell his land at its existing use value, whilst the purchaser would obtain without paying for it a part of its development value. It may be true that land acquired compulsorily under section 43 may be disposed of on terms inclusive of a development charge which is less than the full development

value, but there is nothing in the Act to which your Lordships' attention was drawn to show that land cannot be sold at prices higher than its existing use value, and I am unable to see that the discretion, if there is a discretion, which the Board have to assess the development charge on less than the full developed value has any bearing on the interpretation of section 43.

LORD MACDERMOTT. My Lords, this appeal seems to me to present little difficulty once a decision is reached as to the true construction of section 43 (1) of the Town and Country Planning Act, 1947. This subsection provides as follows: "The Central Land Board may, with the approval of the Minister, by agreement acquire land for any purpose connected with the performance of their functions under the following provisions of this Act, and in particular may so acquire any land for the purpose of disposing of it for development for which permission has been granted under Part III of this Act on terms inclusive of any development charge payable under those provisions in respect of that development."

In the course of the argument three views were advanced as to the meaning of this enactment. These, in my opinion, exhaust the relevant possibilities. They may be stated thus:—

(1) The second limb of the subsection confers a power separate and distinct from, and wholly independent of, that contained in the first limb, the words "and in particular" which introduce the second limb being used as words of emphasis only, and not as indicating an example of the power conferred by the first;

(2) The second limb but particularizes something already within the general terms of the first, and, accordingly, the expression "for any purpose connected with the performance of their functions" must be satisfied before power arises under either limb. In other words, the Board will have no power of acquisition in a case falling within the language of the second limb, if the purpose of the acquisition is not also in fact connected with the performance of their functions under the subsequent provisions of the Act; and

(3) The second limb gives an instance of the power conferred by the first, but in terms which amount to a statutory recognition of the purpose described in the second limb as being within the scope of the first. Accordingly, if the case comes within the wording of the second limb (the word "so" being read as connoting acquisition by agreement and with the approval of the Minister) there is no need, in order to perfect the power it

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purports to confer, to trace a connexion between the purpose therein mentioned and the performance of some function of the Board.

Of these alternatives, view (1) is the most easily discarded. The structure of the subsection is against it and so, I think, is the ordinary usage of the expression "in particular," though no doubt these words are occasionally employed merely to stress or direct attention to what they preface. Moreover, I find it difficult to see why a power to acquire land should be conferred on a statutory body in terms which are not to be related to the performance of its statutory functions, as the acceptance of this view would apparently entail. It seems to me that the proper approach to the second limb must be through the first, and not regardless of it; and, if that is right, view (1) falls out of account and the choice lies between views (2) and (3).

This choice I am content to make on what appears to me to be the natural meaning of the wording of subsection (1), for I have not found elsewhere in the Act anything to indicate that the language of the subsection is used otherwise than in its ordinary everyday sense. Reading the enactment in this way I am in favour of view (3). The word "so" in the expression "and in particular may so acquire" at the beginning of the second limb, incorporates the earlier words of the first limb "with the approval of the Minister, by agreement . . .," but it is, I think, impossible to go further and say that it also incorporates the expression "for any purpose connected with the performance of their functions." And if that expression is not to be read into the second limb by way of reference, I see no good reason for implying it on the strength of the context. It may also be observed that view (2), unlike view (3), denies the second limb any practical legislative effect, and, further, that in section 43 (2) the words "for any such purpose as aforesaid" are, grammatically and naturally, capable of referring to the purpose described in the second limb alone. Both these considerations seem to me to lend support to view (3) and the definitive character of the second limb which it adopts; but, when all is said, perhaps the best reason for the conclusion I have reached is just that it accords with what this second limb of the subsection says, namely, that the Board "may so"—i.e., by agreement and with ministerial approval—"acquire any land for the purpose of disposing of it for development . . . on terms inclusive of any development charge. . . ." If the purpose thus described had no perceptible connexion with the performance of the Board's statutory functions

the position might be different. But, as it is, the purpose of disposing of land ripe for development at a price inclusive of the development charge is, *prima facie*, connected with the Board's function of collecting the charge, and I think what the legislature has done in the second limb is simply to preclude the possibility of contention as to whether in fact a connexion of this sort exists by coupling the power to acquire plainly and directly to the specified purpose. I find nothing strange or irrational in this, for it is reasonable enough that a purchaser from the Board who pays the development charge as part of the price should not have his title dependent on what may or may not come within a phrase so vague and wide as "any purpose connected with the performance of their functions under the following provisions of this Act."

My Lords, with section 43 (1) construed in this manner, there is no need to embark upon the task of tracing a connexion between the acquisition in question and the Board's statutory functions. The bona fides of the Board and the genuineness of their resolution of May 13, 1949, have not been challenged. This resolution states the purpose of the acquisition in terms which echo those of the second limb of section 43 (1), and there has been no suggestion that in fact such was not the true and immediate purpose of the acquisition. In these circumstances it is, in my opinion, beside the point that, in seeking to acquire land for the purpose thus stated, the members of the Board, or some of them, may have been moved by considerations of policy which, in themselves, would not (as I shall assume without deciding) constitute a purpose within the meaning of any part of section 43 (1). The short answer to all the submissions as to motive is that, on the facts here, the Board have brought their case within the express terms of the second limb of that subsection.

For these reasons I would dismiss the appeal.

LORD TUCKER. My Lords, this case turns upon the proper construction of section 43 (1) of the Town and Country Planning Act, 1947, which reads as follows: "The Central Land Board "may, with the approval of the Minister, by agreement acquire "land for any purpose connected with the performance of their "functions under the following provisions of this Act, and in "particular may so acquire any land for the purpose of disposing "of it for development for which permission has been granted "under Part III of this Act on terms inclusive of any develop- "ment charge payable under those provisions in respect of that "development." Subsection (2) goes on to give the Minister

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power to authorize the Board to acquire the land compulsorily in any such case where the Board are unable to acquire the land by agreement on reasonable terms, if he considers it expedient in the public interest that the Board should acquire the land for any such purpose.

Now, it is not in dispute that in the present case the compulsory purchase was made with a view to the acquisition of the land by the Board for the purpose of disposing of it for development for which permission had been granted at an inclusive price, a transaction which is plainly within the express language of subsection (1). But it is said that the order was *ultra vires* by reason of the words in the subsection preceding the words "in particular." My Lords, it is, of course, possible that the preceding words might have been so framed as to bring about this somewhat surprising result, but they would have to be very clear before I was persuaded to put such a construction upon them.

In my view the true construction of this subsection is that placed on it by Somervell L.J.¹⁹: "I think the words should be construed as making clear that a certain power, as to which there might have been doubt, is to be regarded as one in connexion with the functions of the Board." I think it would otherwise have been open to debate whether or not a purchase of this kind was connected with the functions of the Board. The language used has, however, in my view placed the matter beyond dispute, although were it necessary for the decision of the case I should have been prepared to hold that such a purchase was "connected with" two functions of the Board, viz., their function of assessing the development charge and their function of collecting it. I think that unrestricted sales on a large scale at prices in excess of existing use value would render more difficult the proper ascertainment of the true existing use value, which is a necessary element in calculating the development charge, and that it being the function of the Board to collect the charge, to set it against the payments which they will have to make out of the £300 million compensation fund, a policy which tends to facilitate and ensure a speedy payment of the charge by including it in the sale price, is a policy the implementing of which is connected with their fiscal functions under the Act. The declared policy of the Board to discourage—by compulsory purchase if necessary—sales of land at prices in excess of existing use value seems to me to be one which the Act has empowered them to

¹⁹ [1951] 2 K.B. 284, 297.

carry out, by conferring upon them this power to acquire land for the purpose of disposing of it for development for which permission has been granted at an inclusive price, and it is impossible to say that purchases made for this purpose are ultra vires. That the Act might have prohibited, but did not prohibit, sales in excess of existing use value, or that the exercise of such powers tends to restrict in some degree the right given by section 64 to assign a claim on the compensation fund, are matters which afford me no assistance in the construction of subsection (1) of section 43.

On this short ground I would dismiss this appeal.

Appeal dismissed.

Solicitors: *Warren, Murton & Co., for Newman & Bond, Barnsley; Treasury Solicitor.*

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ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL.

West Africa (Nigeria)—Chief—Appointment—Whether in accordance with native law and custom—Governor the sole judge—Jurisdiction of courts excluded—"Due inquiry"—Duties of Governor—Appointment and Deposition of Chiefs Ordinance, 1948, c. 12 of Nigeria (No. 14 of 1930 as amended by No. 20 of 1945), s. 2 (1) (2).

By subsection (2) of section 2 of the Appointment and Deposition of Chiefs Ordinance, 1948, of Nigeria: "In the case of any "dispute the Governor, after due inquiry and consultation with "the persons concerned in the selection, shall be the sole judge as "to whether any appointment of a chief has been made in accordance with native law and custom."

The above subsection commits to the Governor exclusively the duty of judging whether an appointment has been made in accordance with native law and custom, and the jurisdiction of the courts to decide that question is absolutely and unconditionally excluded by the subsection.

* *Present*: LORD NORMAND, LORD RADCLIFFE and LORD ASQUITH OF BISHOPSTONE.

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The requirement that there shall be due inquiry and consultation with the persons concerned in the selection is not a condition precedent to the Governor's jurisdiction as sole judge or to the exclusion of the court's jurisdiction, but it is a condition of the Governor's valid exercise of his function of sole judge. If he comes to a decision without having made due inquiry or consultation then in an appropriate action it would be competent for the courts to set his decision aside. In no circumstances, however, could the courts assume to themselves jurisdiction to decide that an appointment had or had not been made in accordance with native law and custom, and accordingly, when an action was so framed as to submit that question to the court's decision the action was incompetent.

"Due inquiry" was not necessarily public inquiry, but it implied that the parties to the dispute should be given an opportunity of being heard by the Governor as judge between them, and in intimating a decision under section 2 (2) the Governor should unambiguously declare that the appointment had (or had not) been made in accordance with native law and custom.

Judgment of the West African Court of Appeal affirmed.

APPEAL (No. 25 of 1950) from an order of the West African Court of Appeal (December 4, 1948), allowing an appeal from an order of the Supreme Court of Nigeria (February 7, 1948).

The dispute out of which this appeal arose concerned the right of succession to the office of Timi (head chieftain) of the town of Ede, in the Ibadan District of Oyo Province, Nigeria, which became vacant on the death of the previous Timi on January 24, 1946. Conflicting claims to the office were made by the appellant and the second respondent. In his action the appellant, as plaintiff, claimed, *inter alia*, a declaration that he was duly selected by the Ede Kingmakers as Timi of Ede in April, 1946, in accordance with native law and custom.

The order of the Supreme Court (Jibowu J.) had made a declaration that the selection of the second respondent and his subsequent installation as Timi of Ede were contrary to the native law and custom governing the selection of the Timi and were therefore null and void, and a second declaration that the appellant was the person qualified and entitled by native law and custom to hold the office of Timi, and that he had been duly elected in April, 1946, in accordance with native law and custom.

The West African Court of Appeal (Blackhall P., Verity C.J. and Lewey J.A.) held that the courts had no jurisdiction to entertain the suit.

By the Appointment and Deposition of Chiefs Ordinance, 1948:

" 1. This Ordinance may be cited as the Appointment and Deposition of Chiefs Ordinance, and shall apply to the Colony and Protectorate (including the Cameroons under British Mandate).

" 2. (1) Upon the death, resignation or deposition of any chief or of any head chief, the Governor may approve as the successor of such chief or head chief, as the case may be, any person appointed in that behalf by those entitled by native law and custom so to appoint in accordance with native law and custom: and if no appointment is made before the expiration of such interval as is usual under native law and custom, the Governor may himself appoint such person as he may deem fit and proper to carry out such duties incidental to the chieftaincy as it may be necessary to perform.

" (2) In the case of any dispute the Governor, after due inquiry and consultation with the persons concerned in the selection, shall be the sole judge as to whether any appointment of a chief has been made in accordance with native law and custom.

" 3. The Governor may grade head chiefs as first, second, third, fourth or fifth class according to their importance.

" 4. The Governor, after due inquiry and consultation with the persons concerned in the selection, may depose any chief or any head chief whether appointed before or after the commencement of this Ordinance, if after inquiry he is satisfied that such deposition is required according to native law and custom or is necessary in the interests of peace, or order or good government.

" 5. For the purposes of sections 2 and 4 of this Ordinance, the words 'chief' and 'head chief' mean a chief or a head chief who has been appointed to the office of native authority under the provisions of the Native Authority Ordinance or which office is deemed to be constituted thereunder, or who is a member of a native authority constituted or deemed to be constituted under the provisions of that Ordinance or, where the office of native authority so appointed or deemed to be constituted, is a chief associated with a council, any chief or head chief who is a member of that council and any chief or head chief who is a member of an advisory council."

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1952. April 2, 3. *Cope Morgan Q.C.* and *Howard Collier* for the appellant. The claim as made in the action was that

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the selection of J. A. Laoye, the second respondent, as Timi of Ede by the Olubadan-in-Council was contrary to native law and custom and therefore null and void, and that the appellant was the person qualified and entitled by native custom and tradition to the office of Timi. It is common ground that this case really depends on the interpretation of the Appointment and Deposition of Chiefs Ordinance, 1948, s. 2 (2). That was an amended Ordinance; the original form was that "The Governor shall be the sole judge as to whether any appointment of a chief or head chief . . . has been made in accordance with native law and custom." The question is, what must be the inference from the insertion in the amended subsection of the words "after due inquiry and consultation"? The inquiry must be an independent inquiry by the Governor or his representative acting as sole judge. The inquiry must be subsequent to an appointment which has been made, and which is the subject of inquiry and consultation. The appointment, to be approved, must have been made in accordance with native law and custom. An appointment otherwise than in accordance with native law and custom is ultra vires. And, lastly, due inquiry and consultation under the Ordinance must afford a hearing to, amongst others, those who claim to have been selected in accordance with native law and custom.

In this case the Governor purported to approve the appointment of the second respondent, and he gave the approval without having had any due inquiry at all. In fact, no such inquiry has taken place, and therefore the Governor has not put himself in the position to confirm the appointment, which has not in fact been made in accordance with native law and custom. There are findings of fact to that effect. The appellant's appointment was in fact made in accordance with native law and custom. The court can investigate whether the Governor acted in consonance with the powers given to him by the Ordinance. "Due inquiry" must mean due inquiry by the Governor. In *Oke Lanipekun Laoye v. Amao Oyeturunde*,¹ which was before the amendment of the Ordinance in 1945, this Board said that the whole policy of the British Government was to ensure that native law and custom was maintained. [Reference was also made to *Franklin v. Minister of Town and Country Planning*.²] Whether the Governor has acted in pursuance of his powers under the Ordinance must be a matter of which the court can take cognizance. The fact

¹ [1944] A.C. 170, 172.

² [1947] 1 All E.R. 612, 616.

that a chief, duly elected in accordance with the accepted forms of native law and custom, has not been recognized by the Governor is not sufficient to invalidate the election: *Taiwo v. Odunsi Sarumi*.³ It was held in *Eshugbayi Eleko v. Government of Nigeria*⁴ that the powers of the Governor under the Ordinance there in question were purely executive, and that "it was the "duty of the court to investigate the questions raised by the "appellant's contentions and to come to a judicial decision "thereon." It was said in that case that "Their Lordships are "satisfied that the opinion which has prevailed that the courts "cannot investigate the whole of the necessary conditions is "erroneous. The Governor acting under the Ordinance acts "solely under executive powers, and in no sense as a court."⁵ And in *Errington v. Minister of Health*⁶ Roche L.J. said: "As "to the principles applicable . . . where judicial functions, or "quasi-judicial functions, have to be exercised by a court or by "a board, or any body of persons, it is necessary and essential, "in the words of Lord Loreburn in *Board of Education v. Rice*,⁷ "that they must always give a fair opportunity to those who "are parties to the controversy to correct or to contradict any "relevant statement prejudicial to their view."

The West African Court of Appeal, having determined in its first judgment that the court had jurisdiction and that the trial judge should determine the issues before him, was wrong in deciding by its second judgment that the trial judge had no jurisdiction and ought not to have considered the merits of the case. The Court of Appeal was not entitled thus to reverse its own decision: *Young v. Bristol Aeroplane Co. Ltd.*,⁸ per Lord Greene M.R., with which Viscount Simon agreed on the appeal to the House of Lords.⁹ Lastly, with regard to the Court of Appeal's right to deal with the findings of fact of the trial judge, see *Kisiedu v. Dompree*¹⁰; the Court of Appeal in this case could not upset the findings of the trial judge. On the facts and the law applicable the decision of the Supreme Court of Nigeria of February 7, 1948, was right.

Gahan Q.C. and *F. R. A. Williams* for the respondents. It is clear that the trial judge did not hold that the appellant was properly appointed, because he held that there was a right to reject a nominated person by the Olubadan-in-

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Council, and therefore there was not the necessary approval. What the trial judge dealt with in his judgment was the simple question, was or was not the second respondent properly appointed in accordance with native law and custom, and that is a question which, by the words of the Ordinance, can be dealt with by the Governor and by him alone. The main point is that the relief which was claimed in this action depended on the determination of whether or not the appointment of the second respondent had been made in accordance with native law and custom, and that is a dispute which, under the terms of section 2 (2) of the Ordinance can only be determined by the Governor. Under section 2 (2) there must be an appointment in accordance with native law and custom, and if there is, then the Governor may approve. Even if, after the appointment, it was alleged that the man was not properly appointed, then there would be a dispute which came within section 2 (2).

It was contended for the appellant that section 2 (2) is to be read as, unless and until the Governor held an inquiry, and unless and until he consulted with the persons concerned in the selection, he had no authority to determine a dispute, and that until those conditions precedent were satisfied there was nothing which ousted the jurisdiction of the court. It is submitted that the whole matter of native law and custom, and whether it has been applied, is entrusted to the Governor, and when he comes to decide the point he must hold an inquiry and he must consult. If he does not, then his decision would be a nullity: he would not be acting within the authority conferred; but the result of that would be that the Governor would then have to make a proper determination. If it is being said that the determination, or the purported determination, by the Governor of a dispute is a nullity because the conditions have not been complied with, that point can only be raised in proceedings to which the Governor, or the proper officer representing him, is a party. It is not a matter which can be litigated between two individuals behind the back of the Governor. The only appropriate remedy in such a case would be to have the decision set aside.

In this case, however, the whole of the relief claimed by the appellant falls within the general proposition that it is necessary to have a decision on the dispute by the Governor as the foundation of the claim. None of the relief claimed, or which could be claimed, in this action was relief which the court could give. In any event, this is not a case in which the court, even if it had

jurisdiction to do so, should grant any relief. The remedy which the appellant has sought here depends on the determination of a matter which only the Governor can determine, and in those circumstances the order of the Court of Appeal was right.

There cannot be read into the provisions of the Ordinance that the Governor must hold something in the nature of a trial. He is given a very wide discretion, and what inquiry and what consultation has to be made would depend very much on the character of the dispute. It need not, it is submitted, be an inquiry in the sense of importing English decisions on other matters of that apparent nature. The evidence established that the Governor by his duly appointed deputy had made due inquiry, and had consulted with the persons concerned in the selection, and had adjudged that the second respondent had been appointed Timi in accordance with native law and custom.

F. R. A. Williams followed. The Governor, as sole judge, is entitled to look into the conduct of the Olubadan-in-Council to see whether they have followed the principles of native law and custom. *Laoye's* case¹¹ is of no assistance; it was decided before the date of this Ordinance.

Cope Morgan Q.C. in reply. Except in form, in point of fact the whole matter was argued below as if the Governor had been made a party.

May 5. The judgment of their Lordships was delivered by LORD NORMAND. This is an appeal from an order of the West African Court of Appeal dated December 4, 1948, allowing an appeal from an order of the Supreme Court of Nigeria dated February 7, 1948, and entering judgment for the respondents, the defendants in the action. The order of the Supreme Court had granted an injunction restraining the second defendant and respondent from performing the duties of the Timi of Ede and from receiving the salary attached to the office of Timi, a declaration that the selection of the second respondent and his subsequent installation as Timi of Ede were contrary to the native law and custom governing the selection of a Timi of Ede and were therefore null and void, a second declaration that the appellant is the person qualified and entitled by native law and custom to hold the post and enjoy the office and title of Timi of Ede, and a third declaration that the appellant was duly selected by

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the Ede Kingmakers as Timi of Ede in April, 1946, and that the selection was in accordance with native law and custom. The injunction and declarations granted by the Supreme Court are in precise accordance with the relief sought in the appellant's summons and statement of claim so far as now insisted in. In the statement of claim an additional declaration was sought, but it was refused by the Supreme Court and was thereafter abandoned. The Court of Appeal held that the courts had no jurisdiction to entertain the suit.

In his pleadings the appellant alleged that he had been selected by the persons entitled by native law and custom to select the Timi of Ede and had been unanimously recommended by them for approval of the Governor through the Olubadan-in-Council, the first defendant and respondent, but that the Olubadan-in-Council, contrary to native law and custom, appointed the second respondent to fill the vacant office of Timi. There were also allegations that the first respondent acted in bad faith in appointing the second respondent and that the Resident of Oyo province, in which the town of Ede is situated, had also acted in bad faith in approving the appointment of the second respondent as Timi of Ede. The Supreme Court acquitted the Resident of bad faith and the appellant has acquiesced and does not now allege bad faith against the Resident. The respondents in their pleadings denied the material allegations of the appellant, and they further averred that the selection and approval of the second respondent was based on a public inquiry held at Ede in May, 1946, when it was discovered that the majority of the Chiefs and people of Ede were strongly in favour of the appointment of the second respondent as Timi. Both respondents pleaded to the jurisdiction of the court without specifying the grounds of the plea.

On the merits, therefore, it is apparent that the dispute between the parties concerned the right of succession to the office of Timi of the town of Ede vacant by the death of the previous Timi on January 24, 1946, and that conflicting claims to the office were made by the appellant and the second respondent. It should be explained that the Timi of the town of Ede is the head chieftain of the town, and that if he is approved by the Governor or his delegate he becomes also the president of the district council or local authority of Ede and that as such he is entitled to a stipend. The town of Ede is within the area of the Ibadan Native Authority known as the Olubadan-in-Council,

presided over by the Olubadan, and the Ede District Council is subordinate to the Olubadan-in-Council.

The evidence taken in the Supreme Court disclosed that the dispute between the parties covered a wide field, including the questions whether the second respondent was eligible for the office of Timi, who were the parties within the town of Ede entitled to nominate a candidate, who were the parties within the town of Ede entitled to make a final selection, whether their selection must be unanimous, and whether their choice could be overruled by the Olubadan-in-Council. All these questions depend on the proper ascertainment and application of the relevant native law and custom. It is for this reason that the issue of jurisdiction assumes a special importance and becomes the determining issue in the appeal, for the Appointment and Deposition of Chiefs Ordinance, c. 12 of Nigeria, 1948 (No. 14 of 1930 as amended by No. 20 of 1945), makes special provision for preserving native law and custom in the appointment of a chief or head chief, and this Ordinance admittedly applies in this case. The text of the Ordinance is as follows. [His Lordship stated the provisions of the Ordinance and continued:] It is of importance to note that section 2 (2) originally read: "The Governor shall be the sole judge as to whether any appointment of a chief or head chief, as the case may be, has been made in accordance with native law and custom," and that it was by an amendment made by the Ordinance No. 20 of 1945 that the words "in the case of any dispute" and the words "after due inquiry and consultation with the persons concerned in the selection" were added. The Governor it should be said, is entitled to delegate his functions under this Ordinance, and he did in fact delegate them to the Resident of the province on this occasion. It was proved in evidence before the Supreme Court that the Resident was present at a meeting of the Olubadan-in-Council of December 5, 1946, when the Olubadan-in-Council decided to present the second respondent for approval as Timi, and that he then said that everybody knew the facts from the start, that no further inquiry was necessary, and that in due course he would communicate his decision. His decision was intimated in a letter of December 7, 1946, addressed to the Senior District Officer, Ibadan. It was in the following terms:—

"Timi of Ede: Appointment of.

"With reference to the special meeting of the Ibadan Inner Council on Thursday, December 5, I am entirely satisfied that

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“ by native law and custom Mr. Adetoyese Laoye is eligible to
“ succeed to the stool of the Timi of Ede and that he is a fit and
“ proper person by past record to assume the office of the Head
“ of the Ede and Ede District Subordinate Native Authority and
“ to take his seat on the bench of the Native Court. I am also
“ entirely satisfied that the large majority of the Chiefs of Ede
“ eligible to take part in the selection of a Timi of Ede support
“ the candidature of Mr. Adetoyese Laoye. That being so, I
“ convey approval of the recommendation submitted by the
“ Ibadan Inner Council that the selection of Mr. Adetoyese
“ Laoye as the new Timi of Ede should be recognized.”

A copy of this letter was sent to the Olubadan-in-Council for information and necessary action. The effect of the Ordinance and of the Resident's letter will be considered at a later stage. But first it is necessary to turn to the proceedings in the courts, including proceedings which have not yet been mentioned.

The case first came before Jibowu J. in the Supreme Court in August, 1947, when it was submitted by Crown counsel appearing for the respondents that the jurisdiction of the court had been ousted by the Ordinance because the Governor was the sole judge whether the selection of the Timi had been in accordance with native law and custom. The judge gave effect to this contention, holding that it was for the Governor or his delegate to satisfy himself that the appointment of the Timi had been properly made, and that the Resident's letter of December 7, 1946, showed that he was satisfied that due inquiry had been made according to native law and custom by those who made the selection. An appeal was taken to the Court of Appeal, which by a judgment of November 10, 1947, reversed the order of the Supreme Court. The judgment was delivered by the President, who said that if it could be shown that no due inquiry or consultation had taken place then the condition precedent to the Governor's being vested with the powers of sole judge had not been fulfilled, and that the courts would certainly have the power to set aside the order approving the appointment of the second respondent. The President also held that the Resident's letter did not show that due inquiry had been made by him. By the formal order of the Court of Appeal the case was returned to the trial judge to determine the issues before him, after hearing evidence tendered by both parties, in the light of the interpretation placed by the Court of Appeal on the Ordinance. When the case came for the second time before the Supreme Court, Crown

counsel submitted for the respondents that the only issue then to be tried was whether due inquiry had been made by the Resident before he gave his approval of the second respondent's appointment as Timi. But the appellant's counsel persuaded the judge to deal with the whole issues raised by the pleadings. After hearing evidence, some of which has been referred to above, the judge held that there had been no due inquiry by the Resident and therefore that the Governor could not claim to be the sole judge, since one of the conditions precedent to his assuming the role of a sole judge had not been fulfilled. He further held that the jurisdiction of the court had not been ousted and proceeded to consider whether the second respondent had been appointed in accordance with native law and custom. Having done so, he came to the conclusion that native law and custom had been disregarded in several ways which need not now be particularized. He granted, as has already been said, the essential part of the relief sought by the appellant. In the Court of Appeal the argument was limited by direction of the court to the issue of jurisdiction. The first judgment was delivered by Lewey J.A., who had not been a party to the earlier judgment. He held that the provisions of section 2 (2) of the Ordinance, so far as relating to due inquiry, were merely directions as to the manner in which the Governor ought to proceed and that the court was entirely precluded from entertaining in any way or in any action the question whether due inquiry had been made. Verity C.J., who had been a party to the previous decision, did not agree with this construction of section 2 (2) of the Ordinance. He held that if it is alleged that no due inquiry had been held it was open to the proper party to come to the court and seek the appropriate relief, and he held also that the form of action adopted in this case was inappropriate and that the remedy sought was misconceived. Blackhall P., who was not a party to the previous decision, while agreeing with the conclusions of Lewey J.A. and Verity C.J., said that even if the Governor failed to comply with the requirements of section 2 (2) of the Ordinance that would not confer jurisdiction on the courts to decide whether the appointment of a chief had been made in accordance with native law and custom.

Their Lordships have heard argument on the question of jurisdiction only and, with reference to that question, on the construction of the Ordinance. They are of opinion that sub-sections (1) and (2) of section 2 must be read together and as

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parts of one section. The first part of section 2 (1) provides for what may be considered the normal case, where no dispute has emerged at the time when the appointment of a candidate is submitted to the Governor. But it may happen that after the date of approval a dispute arises whether the appointment was in accordance with native law and custom, and it is in that event that the words "by those entitled by native law and custom so "to appoint in accordance with native law and custom" have their importance and value in this subsection. Section 2 (2) provides for the case where a dispute has emerged either before approval is given or after it is given. It is then the function of the Governor as sole judge to decide whether the appointment has been made in accordance with native law and custom. If the Governor decides that native law and custom have not been observed, an approval already given would *eo ipso* fall. But though the non-approval disqualifies the appointee from exercising any of his local authority functions his appointment as Timi is not invalidated unless the Governor takes further action under section 4 to depose him. For the election of a chief is valid though no approval of it is given (*Taiwo v. Sarumi*¹²). Section 2 (2) in terms commits to the Governor exclusively the duty of judging whether an appointment has been made in accordance with native law and custom and the jurisdiction of the courts to decide that question is absolutely and unconditionally excluded by this subsection. The requirement that there shall be due inquiry and consultation with the persons concerned in the selection is not a condition precedent to the Governor's jurisdiction as sole judge or to the exclusion of the courts' jurisdiction, but it is a condition of the Governor's valid exercise of his function of sole judge. If he comes to a decision without having made due inquiry or without having consulted with the persons concerned in the selection there can be no doubt that in an appropriate action it would be competent for the courts to set his decision aside. But in no circumstances can the courts assume to themselves jurisdiction to decide that an appointment has or has not been made in accordance with native law or custom, and an action framed, as this action is framed, to submit that question to the courts' decision is incompetent.

It is manifest that the Ordinance, and particularly the amendment made in 1945, are designed to ensure the observance

¹² [1913] 2 Nig.L.R. 103.

of native law and custom in the appointment and deposition of chiefs, and it is of the highest importance for the welfare and contentment of the native population that the Governor should strictly adhere to the requirements attaching to the exercise of his exclusive jurisdiction. The subsection imposes two requirements, due inquiry and consultation. Due inquiry is not necessarily public inquiry, but it does imply that the parties to the dispute should be given an opportunity of being heard by the Governor as judge between them, and therefore that the date on which the inquiry is to take place should be intimated to them and that they should be invited to attend and state their case. Without that the substantial requirements of justice would not be fulfilled (*Board of Education v. Rice*,¹³ per Lord Loreburn L.C.; *Local Government Board v. Arlidge*,¹⁴ per Viscount Haldane L.C.; *Errington v. Minister of Health*,¹⁵ per Roche L.J.). In intimating a decision under section 2 (2) it is important also that the Governor should unambiguously declare that the appointment had (or had not) been made in accordance with native law and custom. The Ordinance does not in terms impose this form in giving a decision, but the proper performance of the Governor's judicial duty requires that there should be in a matter of such importance to the native population a clear public intimation that the judicial duty expressly laid on the Governor has been exactly fulfilled. The Resident in this case, in his intimation of approval, declared that he was satisfied that by native law and custom the second respondent was eligible for the office of Timi of Ede. But the dispute between the parties had covered a far wider area than that, and there was a pointed absence of a declaration that on the other matters in dispute the Resident was satisfied that native law and custom had been observed.

Counsel for the first respondent submitted that the letter of December 7, 1946, intimated a decision given not under section 2 (2) but under section 2 (1), and before the Resident became aware of the existence of a dispute. This submission is in their Lordships' opinion unmaintainable. The Resident was fully aware that there was a dispute, for he had been present at meetings when the Olubadan-in-Council had discussed the points in issue, and in his evidence he did not attempt to make the case

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¹³ [1911] A.C. 179, 182.¹⁴ [1915] A.C. 120, 132.¹⁵ [1935] 1 K.B. 249, 280.

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that his counsel tried to make for him. His position was that an inquiry had been held on July 19, 1946. On that date there took place one of the meetings of the Olubadan-in-Council at which the dispute was discussed in the Resident's presence. But the Resident held no inquiry on that date. It was not till five months later that the second respondent's name was submitted for approval. It was then that an inquiry by the Resident should have been held, and admittedly there was none.

Their Lordships might accordingly have had little difficulty in finding that the requirements of the Ordinance had not been fulfilled. But whether they were fulfilled or not the courts have no jurisdiction to grant the only relief sought in this action. There may be cases in which this Board, finding itself unable to grant the specific relief claimed, would yet be disposed to grant some other relief if equity and justice warranted it. But the appellant ought to have appreciated the weakness of his case at latest by the date of the first judgment of the Court of Appeal, and he should then have reframed his action by amendment, or abandoned it and brought another action in competent form. He did neither, and when the case came before the Supreme Court on return from the Court of Appeal his counsel insisted that the court should entertain and decide the question whether native law and custom had been violated. He has never deviated from that position till the last stages of the hearing of this appeal, and it would now be unfair to his opponents to allow him to change his ground or to grant him a relief which he has till this last moment never sought.

Their Lordships will therefore humbly advise Her Majesty that the appeal should be dismissed. Each party will bear his own costs of the appeal.

Solicitors: *Reaxworthy, Bonser & Wadkin; Burchells.*

[HOUSE OF LORDS.]

H. L. (E.)*

INLAND REVENUE COMMISSIONERS . APPELLANTS;
 AND
 DOWDALL, O'MAHONEY & CO. LD. . RESPONDENTS.

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 Nov. 14,
 15, 16;
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 Feb. 25.

Revenue—Excess profits tax—Foreign company trading in Britain—Whether foreign taxes deductible in computing profits—Income Tax Act, 1918 (8 & 9 Geo. 5, c. 40), Rules applicable to Cases I and II of Sch. D, r. 3 (a)—Finance (No. 2) Act, 1939 (2 & 3 Geo. 6, c. 109), Sch. VII, Pt. I, para. 5—Finance Act, 1940 (3 & 4 Geo. 6, c. 29), s. 30.

An Irish company with two branches in the United Kingdom was assessed to and paid taxes in Eire similar to British income tax, national defence contribution and excess profits tax, on the whole of its profits, including those of the British branches. It was likewise assessed to United Kingdom excess profits tax on the full amount of the profits of those branches without any deduction in respect of Irish taxation:—

Held, that the proportion of the taxes paid by the company in Eire in respect of profits of its trade arising in the United Kingdom were not deductible in arriving at its profits assessable to United Kingdom excess profits tax, since (1) the Irish taxes were not “disbursements or expenses . . . wholly and exclusively laid out or “expended for the purposes of the trade” (i.e., for the purpose of earning the profits) within r. 3 (a) of the Rules applicable to Cases I and II of Sch. D to the Income Tax Act, 1918, and, (2) further, the company was not entitled to deduct them by reason of the provisions of para. 5 of Part I of Sch. VII to the Finance (No. 2) Act, 1939, or section 30 of the Finance Act, 1940, inasmuch as no Order in Council under that section had been made.

It is immaterial that Parliament in enacting the legislation of 1939 and 1940 may have assumed that there was a pre-existing right to make such deductions on income tax principles, since there is a distinction between Parliament exhibiting an erroneous opinion as to the existing law and its enacting that the law shall be changed.

Observations of Lord Davey in *Strong & Co. of Romsey Ltd. v. Woodfield* [1906] A.C. 448, 453 and *Smith's Potato Estates Ltd. v. Bolland* [1948] A.C. 508 applied.

Decision of the Court of Appeal, 66 (Pt. 1) T.L.R. 1019 reversed.

APPEAL from the Court of Appeal (Somervell and Singleton L.JJ. and Roxburgh J.).

The facts, stated by Lord Reid, were as follows: The respondents were a company incorporated, managed and controlled in

* *Present*: LORD OAKSEY, LORD REID, LORD RADCLIFFE and LORD TUCKER.

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Eire; they were margarine manufacturers and butter merchants and they had two branches in Manchester and Cardiff where they carried on business as general grocers. They were assessed to excess profits tax in the United Kingdom in respect of the profits of these branches for seven consecutive chargeable accounting periods ending on March 31, 1946, for amounts varying between £5,400 and £9,000. They paid taxes in Eire in respect of the profits of these two branches for these periods and in this case they maintained that they were entitled to deduct taxes which they had paid in Eire in computing the profits of their two branches for the purposes of United Kingdom excess profits tax. No question as to United Kingdom income tax arose because, as a result of an agreement between the British Government and the Government of the Irish Free State, confirmed by section 23 of the Finance Act, 1926, the respondents were not liable to pay United Kingdom income tax; but there was nothing in that agreement or elsewhere to modify the ordinary provisions of the law of the United Kingdom with regard to their liability to pay excess profits tax for the periods in question.

Before the Commissioners for the Special Purposes of the Income Tax Acts the respondents contended that the proportion of income tax, corporation profits tax and excess profits tax paid by them in Eire in respect of these two branches was a business expense and deductible in arriving at their profits assessable to excess profits tax in the United Kingdom. The Special Commissioners upheld this contention; in their decision they said: "In our opinion it was a necessary expense for the respondent company, in carrying on part of its trade at branches in England, to incur Irish taxes. We hold that the appropriate part of the taxes paid in Eire by the respondent company, applicable to the English branches, constitutes money wholly and exclusively laid out and expended for the purposes of its trade as a whole and is deductible in computing its profits or gains for excess profits tax."

A case stated by the Commissioners for the opinion of the King's Bench Division came before Croom-Johnson J., who on October 25, 1949, ordered "that the said case be remitted to the said Commissioners for them to state the evidence upon which the finding is based, that it was a necessary expense of the respondent company in carrying on part of its trade at branches in the United Kingdom to incur Irish taxes and also for the said Commissioners to state in summary form the nature, effect and incidence of the three Irish taxes, referred to in the said

“ case and for this latter purpose, but not otherwise, to hear
 “ further evidence.” The parties agreed a memorandum regard-
 ing these matters, which was as follows: “ That the Irish income
 “ tax, corporation profits tax and excess profits tax referred to in
 “ the case stated were imposed under Irish statutes, the provisions
 “ of which are similar to the provisions of the United Kingdom
 “ Finance Acts imposing income tax, national defence contribu-
 “ tions and excess profits tax, and in particular that the Irish
 “ income tax was imposed on the profits of a trade, which profits
 “ were computed on income tax principles similar to United
 “ Kingdom income tax principles and that the profits of a trade
 “ for assessment to Irish corporation profits tax and excess profits
 “ tax were computed on Irish income tax principles with adapta-
 “ tions similar to the adaptations for the purposes of United
 “ Kingdom national defence contribution and excess profits tax.”

The case then came before the Court of Appeal, and on April 4, 1950, the respondents' appeal was allowed and the determination of the Commissioners affirmed. Against that judgment the present appeal was taken to the House of Lords.

King K.C. and Reginald Hills for the Crown. The profits of the company's business were rightly computed for the purpose of the assessments to excess profits tax and no deduction should be allowed in respect of any amount charged on the company in Eire and paid in respect of income tax, corporation profits tax or excess profits tax under Irish legislation. The respondents can succeed only on one or other of the following grounds: either (a) the payment of the Irish taxes was “ money wholly and exclu-
 “ sively . . . expended for the purposes of the trade ” (rule 3 (a) of the rules applicable to Cases I and II of Sch. D to the Income Tax Act, 1918); or (b) if it was not, nevertheless the legislature has shown a clear intention that the deduction should be allowed. As to (a), the deduction sought by the company is prohibited for income tax purposes by the rule, and this applies also to the computation of profits for the purposes of excess profits tax (section 14 (1) of the Finance (No. 2) Act, 1939; see also sections 12 and 18). The payment of such taxes by a trader is not a disbursement wholly and exclusively laid out for the purposes of his trade, whether they be United Kingdom or foreign or dominion taxes: see *Strong & Co. of Romsey Ltd. v. Woodfield*¹; *Inland Revenue Commissioners*

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¹ [1906] A.C. 448, 451, 452, 453.

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Persons may sometimes have to pay sums periodically in order to carry on their profession and such sums would be deductible for the purposes of income tax. But normally a man does not have to pay sums in order to obtain the privilege of trading, and the payment of such taxes as this imposed by the State within the territory of which he is carrying on business is not a payment of that description. Taxes are not deductible as expenses and the fact that these are Irish taxes is no reason why the company should be allowed to deduct them. If a tax imposed abroad were deductible, a foreign country by imposing tax at a high rate could draw money away from the British Exchequer. The Irish taxes were taxes on profits and the company had to earn its profits before any tax could be imposed. Those taxes were not expenses of a commercial character incurred in the carrying on of the trade of the branches in the United Kingdom, but were incurred in the course of meeting the company's liability to tax in Eire resulting from its residence and carrying on business there.

The question now to be determined was not decided in *Stevens v. Durban-Roodepoort Gold Mining Co. Ltd.*,⁷ in which an admission was made on behalf of the Crown which is not made here. Further, that case is distinguishable because the Transvaal tax there in question was not really a tax on income or profits. The payment was in effect for a licence and without it the company would not have been allowed to carry on business.

United Kingdom excess profits tax is not in its nature a deductible item, but is expressly made so by section 18 of the Act of 1939.

As to ground (b), the Irish taxes could only be deducted by virtue of some express provision in the Finance Acts. There is no such express provision.

The respondents relied on rule 1 of Case IV of Sch. D to the Income Tax Act, 1918, which first appeared in section 5 of the Finance Act, 1914, but its terms did not support an inference that

² [1920] 2 K.B. 553, 568-9, 571-2.

³ [1919] 2 K.B. 444.

⁴ [1944] W.N. 105; 60 T.L.R. 336.

⁵ [1948] A.C. 508, 511, 515, 518, 526.

⁶ [1948] W.N. 283; 30 Tax Cas. 298, 315.

⁷ (1909) 100 L.T. 481, 482; 5 Tax Cas. 402, 407.

there was some statutory provision which permitted foreign taxes to be treated as deductible expenditure for the purposes of the trade when the income was to be computed under Case I of Sch. D. Cases IV and V have nothing to do with the present question.

The respondents also relied on paragraph 5 of Part I of Sch. VII to the Finance (No. 2) Act, 1939, but it conferred no new right to deduct income tax on income from securities and possessions in the Dominions. There was not to be inferred, either from this paragraph or from section 27 (4) of the Finance Act, 1920, that foreign taxes are deductible as expenditure in computations under Case I of Sch. D. The paragraph, which has no application here, may have been put in to deal with the case of an investment company.

The respondents likewise relied on section 30 of the Finance Act, 1940, but it conferred no right of deduction unless an Order in Council was made, and none had been made. Even if in passing that section Parliament had thought that taxpayers in the computation of their United Kingdom excess profits tax had a right to deduct excess profits tax paid elsewhere, it would have been wrong in so thinking and such an assumption would not make the law. The section cannot be treated as an adaptation of income tax principles to excess profits tax. It is quite a separate provision and not an adaptation of any principle of computation of profits.

[They also referred to *Salomon v. A. Salomon & Co. Ltd.*^s; Ireland Act, 1949, s. 1; Finance Act, 1926, Sch. II; Finance Act, 1937, s. 19, and Finance (No. 2) Act, 1945, s. 51.]

Reginald Hills following. In the case of income tax, by a special provision deduction has been allowed in the case of Irish income tax, but the mere fact of provision having been made for avoiding double taxation shows that the groundwork of the Act recognizes the existence of double taxation (see section 27 of the Finance Act, 1920). It is not necessary for the United Kingdom to reduce its taxation in order to indemnify people in a foreign country. Foreign legislators cannot put their subjects into such a position that they can pay their own taxes and avoid paying taxes in England. In the present case the trade is exercised here and profits have been derived from it here and no intention is to be imputed to the legislature not to tax those profits. In the case of excess profits tax, taking the totality of the trading operations, tax has been put on the person carrying on the trade. The

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payment of Irish taxes is something that is not part of the carrying on of the business, and that occurs after the business has been carried on. Section 27 (4) of the Finance Act, 1920, deals with income tax and not excess profits tax. [He referred to *Inland Revenue Commissioners v. Alexander Von Glehn & Co. Ltd.*⁹; *Union Cold Storage Co. Ltd. v. Jones*¹⁰; *In re G. B. Ollivant & Co. Ltd.'s Agreement*¹¹; *Ormond Investment Co. Ltd. v. Betts*¹² and Finance (No. 2) Act, 1939, s. 14 (1).]

Grant K.C. and *Senter* for the respondent company. The Irish taxes in question are properly deductible under Case I of Sch. D to the Income Tax Act, 1918, being moneys wholly laid out or expended for the purposes of the company's trade in England within the meaning of rule 3 (a) of the rules applicable to Cases I and II of Sch. D. Rule 3 embodies the principles indicated by section 14 of the Finance (No. 2) Act, 1939, which provides that the profits arising from a business are to be computed for the purposes of excess profits tax on income tax principles in accordance with the provisions of Part I of Sch. VII to that Act. There was nothing to prevent the deduction of dominion income tax in computing profits for the purposes of United Kingdom income tax save section 27 (4) of the Finance Act, 1920, and that was removed for excess profits tax purposes by paragraph 5 of Part I of Sch. VII to the Finance (No. 2) Act, 1939. The implication is that, reading the income tax rules with this enactment, dominion taxes are deductible for computing profits for excess profits tax purposes. Paragraph 5 must have been meant to have some effect, and this it can only have if section 27 (4) of the Act of 1920 has something to do with Case I, because excess profits tax is only concerned with Case I and paragraph 5 is only concerned with excess profits tax. But section 27 (4) only expressly refers to Cases IV and V. Accordingly the draftsman of paragraph 5 of Part I of Sch. VII to the Finance (No. 2) Act, 1939, must have considered that the general words in section 27 (4) ("Notwithstanding anything . . . in any other provision of the "Income Tax Act, no deduction shall be made") were clear enough to indicate that some deduction otherwise permissible under Case I was being disallowed by the subsection to necessitate its exclusion in order to restore the deduction under Case I. Had the words in the subsection been doubtful it would not have been needful to employ positive words in paragraph 5. Accordingly, the Act was passed on the basis that

⁹ [1920] 2 K.B. 553.¹⁰ (1924) 8 Tax Cas. 725, 736.¹¹ [1942] 2 All E.R. 528, 531.¹² [1928] A.C. 143.

the taxpayer would be entitled to this deduction. Rule 1 of Case IV of Sch. D first appeared in its present form as section 5 of the Finance Act, 1914. Till 1914, tax under Cases IV and V was levied only on the basis of income remitted to this country, so that the question of the deduction of foreign income tax could not arise. That section first imposed tax on income from foreign securities, etc., whether remitted or not. The significant words in the rule are "where such a deduction cannot be made under "any other provision of this Act," which indicate that the legislature believed that in some cases foreign income tax was deductible and such a deduction must have been allowed accordingly under rule 3 (a) of the Rules applicable to Cases I and II. The rules do not prohibit such a deduction in a Case I assessment. Paragraph 8 of Part I of Sch. VII to the Act of 1939 would be unnecessary if without it there were no right of deduction in respect of the taxes mentioned therein. In any event, it only applies to United Kingdom taxes, which indicates that similar taxes payable abroad must be deductible. On the respondent company's construction paragraphs 5 and 8 harmonize, while if the Crown's contention prevailed paragraph 5 would be an absolute trap.

*Stevens v. Durban-Roodepoort Gold Mining Co. Ltd.*¹³ proceeded on the correct assumption that in the absence of any statutory prohibition foreign taxes are deductible in computing profits for the purposes of United Kingdom income tax under Case I of Sch. D. The tax there was a tax on profits. The decision in that case is precisely the one now sought to be supported by the taxpayer. None of the authorities relied on by the Crown bear on this case at all. Their principle ought not to be extended, since dominion and foreign taxes stand on a different footing from United Kingdom taxes, and should be treated as disbursements which the trader has had to make as a matter of fact and not of law for the purposes of his trade in the United Kingdom. *Smith's Potato Estates Ltd. v. Bolland*¹⁴ is less valuable than the Crown contends as an authority in any other case where the facts are different inasmuch as Lord Porter, Lord Simonds and Lord Normand all found it hard to say where the line should be drawn and to reconcile the law with the practice of the Inland Revenue.

The legislature's intention that such taxes as those now in

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¹³ 100 L.T. 481; 5 Tax Cas. 402.

¹⁴ [1948] A.C. 508, 521, 527, 530.

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question should be deducted in computing profits for the purposes of United Kingdom excess profits tax also appears from section 30 of the Finance Act, 1940, which likewise indicates that Parliament thought that the taxpayer already had such a right of deduction

The view contended for by the Crown would defeat the legislature's clear intention and lead to a result manifestly unjust and oppressive, for unless an enactment allowing the deduction be implied there would be gross injustice in that the effect would be to leave taxpayers in the position of the respondent company, who come here to trade with less than nothing by reason of the taxation in this country and their own.

[They referred to *Liverpool and London and Globe Insurance Co. v. Bennett*¹⁵ and *Odhams Press Ltd. v. Cook*.¹⁶]

King K.C. in reply. The deduction claimed is not allowable by mere inference. [He referred to the Finance Act, 1940, s. 30 (1) (b), and the Finance (No. 2) Act, 1945, s. 51 (1).]

Their Lordships took time for consideration.

1952. February 25. LORD OAKSEY. My Lords, the question arising in the present appeal is whether the proportion of certain taxes paid by the respondent company in Eire in respect of profits of its trade arising in England are deductible in arriving at its profits assessable to excess profits tax of the United Kingdom. In the Court of Appeal and in your Lordships' House the question raised was treated as involving two points: First, whether the Irish taxes in question were "disbursements or expenses . . . wholly and exclusively laid out or expended for the purposes "of the trade" of the company in the United Kingdom within the meaning of rule 3 (a) of the Rules applicable to Cases I and II of Sch. D; and second, whether, even if they were not, the company was entitled to deduct them by reason of the provisions of paragraph 5 of Part I of Sch. VII to the Finance (No. 2) Act, 1939, and section 30 of the Finance Act, 1940.

On the first question it was contended on behalf of the appellants, the Inland Revenue Commissioners, that the authorities establish that the payment of such taxes by a trader is not a disbursement wholly and exclusively laid out for the purposes of his trade and that this is so whether such taxes are United Kingdom taxes or foreign or dominion taxes, and reliance was

¹⁵ [1913] A.C. 610.

¹⁶ (1938-40) 23 Tax Cas. 233, 244.

placed upon the cases of *Strong & Co. of Romsey Ltd. v. Woodfield*¹⁷; *Inland Revenue Commissioners v. Alexander Von Glehn & Co. Ltd.*¹⁸; *Inland Revenue Commissioners v. Warnes & Co. Ltd.*¹⁹; *L. C. Ltd. v. G. B. Ollivant Ltd.*²⁰; and *Smith's Potato Estates Ltd. v. Bolland.*²¹

On behalf of the company it was contended that the principle of these cases ought not to be extended and that dominion and foreign taxes stand on a different footing from United Kingdom taxes and ought to be considered as disbursements which the trader has as a matter of fact and not of law to pay for the purposes of his trade in the United Kingdom. Reliance was also much placed by the respondents upon the case of *Stevens v. Durban-Roodepoort Gold Mining Co. Ltd.*,²² in which Channell J. held that a tax paid in the Transvaal of 10 per cent. on the net produce obtained from working gold mines should be deducted from the profits of the year to which it related before striking the average for the three years. I may say at once that, in my opinion, this is not a decision which affords much help since it was agreed between the Crown and the taxpayer in that case that the tax upon the profits was to be brought in to the computation and the only question was whether it was to be deducted from the profits of the year to which it related or from the average profits of three years.

On the first question I am of opinion that taxes such as those now in question, namely, income tax, corporation profits tax and excess profits tax, are not according to the authorities wholly and exclusively laid out for the purposes of the company's trade in the United Kingdom. Taxes such as these are not paid for the purpose of earning the profits of the trade: they are the application of those profits when made and not the less so that they are exacted by a dominion or foreign government. No clear distinction in point of principle was suggested to your Lordships between such taxes imposed by the United Kingdom government and those imposed by dominion or foreign governments.

The second question is one of more difficulty, but I have come to the conclusion that neither paragraph 5 of Part I of Sch. VII to the Finance (No. 2) Act, 1939, nor section 30 of the Finance Act, 1940, confer upon the taxpayer the right to deduct such taxes.

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¹⁷ [1906] A.C. 448.¹⁸ [1920] 2 K.B. 553.¹⁹ [1919] 2 K.B. 444.²⁰ [1944] W.N. 105; 60 T.L.R. 336.²¹ [1948] A.C. 508.²² 100 L.T. 481; 5 Tax Cas. 402.

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The provision in paragraph 5 of Part I of Sch. VII was, I think, necessary in order to make clear that in cases which would otherwise have come under Cases IV and V deduction of dominion income tax was still to be allowed although the computation was now by section 14 (1) to be made under Case I. But this provision confers no new right of deduction: it merely leaves the right to deduct income tax on investments and possessions in the Dominions as before.

As to section 30 of the Finance Act, 1940, I am of opinion that the section confers no new power upon the Commissioners to allow a deduction in respect of excess profits tax unless an Order in Council has been made, and none had been made at the time the present assessments were made. Subsection (2) was, I think, intended to allow the Commissioners either to make such adjustment of the excess profits tax as might be necessary to give effect to the arrangements with the government of the Dominion or to allow the deduction of the dominion excess profits tax. It was provided by subsection (2), no doubt, that the adjustment should "not be less favourable to the taxpayer than the effect of allowing the deduction," but I do not think these words can be read as conferring a right to the deduction unless the Order in Council was made.

For these reasons, though not without some doubt, I am of opinion that the appeal must be allowed, and I so move your Lordships. In accordance with the order of the Court of Appeal each party will pay their own costs of this appeal.

LORD REID stated the facts and continued:—My Lords, excess profits tax was imposed by the Finance (No. 2) Act, 1939. Section 14 (1) directs that profits shall be "computed on income tax principles as adapted in accordance with the provisions of Part I of Sch. VII to this Act," and "income tax principles" are defined as meaning "the principles on which the profits arising from the trade . . . are computed for the purposes of income tax under Case I of Schedule D, or would be so computed if income tax were chargeable under that Case in respect of the profits so arising." So those "income tax principles" must be applied to the facts of this case.

It is enacted in Schedule D: "1. Tax under this Schedule shall be charged in respect of—(a) The annual profits or gains arising or accruing . . . (ii) to any person residing in the United Kingdom from any trade, profession, employment, or vocation, whether the same be respectively carried on in the United

“ Kingdom or elsewhere; and (iii) to any person, whether a British subject or not, although not resident in the United Kingdom, from any property whatever in the United Kingdom, or from any trade, profession, employment, or vocation exercised within the United Kingdom.” The respondents are assessed to United Kingdom excess profits tax by virtue of sub-paragraph (iii) which I have just quoted, and no doubt they were assessed in Eire in respect of profits arising in the United Kingdom by virtue of the provision in the Irish legislation corresponding to sub-paragraph (ii). The same rules apply whichever be the sub-paragraph applicable. The relevant rules in this case are the rules applicable to Cases I and II: “ 1.—(1) The tax shall be charged without any other deduction than is by this Act allowed ” and “ 3. In computing the amount of the profits or gains to be charged, no sum shall be deducted in respect of (a) any disbursements or expenses, not being money wholly and exclusively laid out or expended for the purposes of the trade, profession, employment, or vocation.” So it is necessary to determine whether any part of the Irish taxes paid by the respondents can in law be regarded as “ money wholly and exclusively laid out or expended for the purposes of ” the respondents’ trade.

It was argued for the respondents that this is a question of fact and that therefore the decision of the Commissioners on this matter is final in their favour. I cannot accept this argument. If certain payments made by a taxpayer are of such a kind that they are capable in law of being regarded as coming within the exception in rule 3 (a) then no doubt it is for the Commissioners to determine whether the circumstances of the case are such that in fact they do come within that exception. But it is, in my judgment, a question of law whether particular payments are of a nature capable of coming within the exception, and that is the issue here.

The respondents argue that foreign taxes on income have in the past been regarded by the Revenue as proper deductions, and that in several enactments Parliament has shown by the language it has used that it regarded such taxes as proper deductions. The question does not appear to have come up in any case before 1909. In that year the case of *Stevens v. Durban-Roodepoort Gold Mining Co. Ltd.*²³ was decided. In that case the taxpayer had paid tax under the Profits Tax (Gold Mines) Proclamation,

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1902, of the Transvaal. It was not disputed that this taxpayer was entitled to some deduction in respect of that tax: the only issue in the case was how the deduction should be computed. United Kingdom income tax was payable by the company on the average of the profits of the preceding three years, and the Transvaal tax had only been paid in the last of these years. The company contended that in computing its income for United Kingdom income tax the Transvaal tax should be deducted from its average profits so that it would get the advantage in that particular year of assessment of the deduction of the whole of that tax. But it was contended, successfully, for the Crown that that tax should be deducted from the profits of the year when it was paid before those profits were averaged with those of the two preceding years. This meant that for that particular year of assessment the company only got a deduction equal to one-third of the tax it had paid, though in the following two years the amount of Transvaal tax paid would also come into the account. It was argued for the appellants in this case that that case is distinguishable because the Transvaal tax was not really a tax on income. Even if this were so I do not think that it is material. The arguments of the parties are reported in the report in Tax Cases, and neither in the arguments nor in the judgment of Channell J. is there any reference to this distinction. The admission made on behalf of the Crown appears to have been of a general character. The reported argument of the Attorney-General contains this passage with regard to the Transvaal tax²⁴: "If it is a sum which, in fairness to the shareholders, " must be treated as withdrawn from the amount available for " division, it is rightly dealt with as a deduction from the profits " of the year in which it falls." It does not appear whether the admission for the Crown was based on an interpretation of the rule which is now rule 3 (a) or on some other ground: but it is difficult to see what else could have been regarded as a warrant for this deduction. It was argued for the respondents that this case is an authority in their favour because the decision is exactly what they are now contending for: but the decision proceeded on an admission which is now withheld. I think that all that the respondents can take from this case is that the Crown's former advisers had a different view of the law from that now maintained. It must now be determined which view is right.

The respondents then drew attention to certain statutory

²⁴ 5 Tax Cas. 402, 405.

provisions with a view to showing that Parliament has long recognized a wider basis for deductions than that for which the appellants now contend. The first of these provisions in point of time is rule 1 of Case IV of Sch. D. That rule, in its present form, first appeared in section 5 of the Finance Act, 1914. Before that date a taxpayer was only liable to pay income tax in respect of income arising from securities in any place out of the United Kingdom in so far as that income was remitted to the United Kingdom and the question of deducting foreign income tax could hardly arise. But in 1914 a British taxpayer became liable in respect of all such income whether it had been or would be received in the United Kingdom or not, and therefore the question of the right to deduct foreign income tax became material. There was then enacted a right to "the deduction" (where such a deduction cannot be made under any other "provision of the Income Tax Acts) of any sum which shall have "been paid in respect of income tax in the place where the income "shall have arisen." Of course, the enactment of a deduction under Case IV and of a similar deduction under Case V cannot help the respondents: what they rely on is the phrase "where "such a deduction cannot be made under any other provision of "the Income Tax Acts." This certainly indicates that Parliament, when enacting this legislation, must have been of opinion that foreign income tax was in some cases at least a good deduction under some other provision of income tax legislation, and it is difficult to see what that other provision could be if not rule 3 (a). One curious feature of this enactment is that it seems to indicate an opinion that, apart from this enactment, foreign income tax would sometimes be deductible and sometimes not. No explanation has been suggested of how that could be, and none occurs to me. The arguments of both parties in this case are inconsistent with this view. If the appellants are right, foreign income tax is never a good deduction under Case I; but if the respondents are right, it would seem that foreign income tax must always be a good deduction.

The respondents next found on the terms of section 27 (4) of the Finance Act, 1920. The purpose of that enactment is to mitigate the hardship of double payment of income tax, and it begins: "Notwithstanding anything in the Rules applicable to "Case IV or Case V of Sch. D or in any other provision of the "Income Tax Acts, no deduction shall be made on account of "the payment of Dominion income tax. . . ." The importance of this section to the respondents' argument is in the phrase

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" or in any other provision of the Income Tax Acts." Again it indicates, though perhaps not so clearly as Case IV, rule 1, that Parliament was of opinion that there was some right to deduct dominion income tax other than that given in respect of Case IV and Case V. I think that the indication here is not so clear because a draftsman sometimes inserts general words of this kind without any very clear idea of what they are intended to cover, and I would not attach great importance to these words if this section stood alone.

But the next provision founded on by the respondents is more significant. I have said that for the purposes of excess profits tax profits are computed on the principles of Case I of Sch. D as adapted by Part I of Sch. VII to the Act of 1939. The respondents found on two of the paragraphs of this Schedule. Paragraph 5 enacts: " The provisions of subsection (4) of section 27 of the Finance Act, 1920 (which disallows deductions on account of the payment of Dominion income tax), shall not apply " and paragraph 8 enacts: " No deduction shall be made on account of liability to pay, or payment of, United Kingdom income tax, the national defence contribution, or excess profits tax." Paragraph 5 must, it is said, have been intended to have some effect. It can have no effect unless section 27 (4) has something to do with Case I; because excess profits tax is only concerned with Case I and paragraph 5 is only concerned with excess profits tax. But section 27 (4) only refers expressly to Cases IV and V. So the draftsman of paragraph 5 must have thought that the general words in section 27 (4) to which I have already referred—" Notwithstanding anything . . . in any other provision of the Income Tax Acts, no deduction shall be made . . ."—were a sufficiently clear indication that some deduction otherwise permissible under Case I was being disallowed by section 27 (4) to make it necessary for him to exclude section 27 (4) and thereby restore that deduction under Case I. If the draftsman had thought that the general words in section 27 (4) were of doubtful effect he would not have used the positive words which are in paragraph 5. Parliament must therefore be taken to have legislated in the belief that there would be this deduction available to the taxpayer. I think that there is some substance in this argument and I shall return to it.

The argument on paragraph 8 is twofold. In the first place the whole paragraph is unnecessary unless there would have been some right to a deduction in respect of payment of these taxes if the paragraph had been omitted; and secondly, it is significant

that the paragraph only applies to United Kingdom income tax, etc. This limitation is said to show that income tax, etc., payable to foreign governments must have been intended to be deductible. I do not find the first branch of the argument very convincing. It is true that one ought not lightly to assume that any statutory enactment has no effect or is superfluous, but it is not very uncommon to find the legislature inserting superfluous provisions under the influence of what may be excessive caution. Paragraph 8 has the effect of providing *inter alia* that in computing profits for assessment to United Kingdom excess profits tax no deduction shall be made on account of liability to pay United Kingdom excess profits tax. I can hardly think that anything but superlative caution can have given rise to this provision. Moreover, it is somewhat difficult to reconcile paragraph 8 with section 18 of the same Act. This section makes payments of excess profits tax a good deduction in computing profits for income tax purposes, so in drafting this section the draftsman must have thought that without it such payments out of profits would not have been allowable deductions. But profits for excess profits tax purposes are also computed on income tax principles; so one would think that when the draftsman came to the Schedule he would still have thought that payments out of profits would not be allowable deductions in computing profits for excess profits tax and would therefore have seen that paragraph 8 was strictly speaking unnecessary. Nevertheless, he put it in. Putting in a provision of this kind is not misleading, and its insertion may well be explained by a cautious desire to make sure. But the limitation to United Kingdom taxes is not so easy to explain, particularly when taken in conjunction with paragraph 5, and I think that this limitation adds some weight to the argument founded on the insertion of paragraph 5.

The respondents also founded on section 30 of the Finance Act, 1940. That section empowers His Majesty to declare by Order in Council that excess profits tax is payable in another part of His Majesty's Dominions in respect of profits in respect of which excess profits tax is also payable in the United Kingdom and that arrangements have been made with the Government concerned for giving relief from double taxation in accordance with principles which are then set out. The first principle set out is "(i) that there shall be computed the amount of excess profits tax which would be payable in each territory if excess profits tax in the other territory, and national defence contribution in the United Kingdom, were disregarded except in

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" computing capital." Then the method of calculating relief in each territory is set out. Subsection (2) then provides: " Where any such Order in Council is made, then, if the Commissioners are satisfied that any case is one which falls within the arrangements to which the Order relates, they shall, in lieu of allowing, in computing profits for the purpose of excess profits tax or the national defence contribution, any deduction in respect of excess profits tax charged in the part of His Majesty's dominions outside the United Kingdom to which the Order relates, make such adjustment of the excess profits tax payable in the United Kingdom or the national defence contribution as may be necessary to give effect to the arrangements, and allow any necessary relief accordingly by repayment or otherwise, so, however, that the effect of the adjustment shall not be less favourable to the taxpayer than the effect of allowing the deduction."

The respondents contend that this section also clearly shows that Parliament was of opinion that, before this Act was passed, a taxpayer had a right to deduct excess profits tax paid elsewhere in the computation of his profits for United Kingdom excess profits tax. I agree. Subsection (2) directs the Commissioners in a case where an Order in Council applies, " in lieu of allowing . . . any deduction in respect of excess profits tax charged " in the other territory to make the adjustment for which section 30 provides, but it adds, " so, however, that the effect of the adjustment shall not be less favourable to the taxpayer than the effect of allowing the deduction." Parliament does not purport in this section to enact that the taxpayer shall be entitled to deduct the other excess profits tax in his computation of profits for United Kingdom tax. It would have been easier and simpler so to enact if it had been thought that the taxpayer had no pre-existing right to make the deduction. Instead, Parliament enacted that in lieu of allowing the deduction (which is not expressly authorized by the section) the arrangement shall be followed: but only if the arrangement is not less favourable than the deduction. Moreover, principle (i), which I have quoted, directs that there shall be computed the amount of excess profits tax which " would be payable " if excess profits tax in the other territory were disregarded. This phraseology is quite inappropriate if the law then was that excess profits tax in the other territory must always be disregarded in computing profit for United Kingdom tax.

The appellant's reply must be that, even if Parliament did

think in 1939 and 1940 that there was a pre-existing right to make such a deduction under income tax principles, Parliament was wrong in so thinking. There is a difference between Parliament exhibiting an erroneous opinion as to the existing law and enacting that that law shall be changed. Before considering this matter I think it necessary to determine what was the existing law, and whether, in light of decisions of this House, it is possible to read the rules which are applicable to Case I in a way which would permit the deductions claimed. Counsel for the respondents admitted, rightly in my opinion, that rule 3 (a) of the Rules applicable to Cases I and II is the only rule on which he could rely.

The rule in the Income Tax Act, 1842, which corresponded with what is now rule 3 (a) was considered in *Strong & Co. of Romsey Ld. v. Woodifield*.²⁵ I need not set out the facts of that case. I shall only quote the passage in the speech of Lord Davey dealing with this rule²⁶: he said of the words in the rule, "for the purpose of the trade," that these words "appear to me "to mean for the purpose of enabling a person to carry on and "earn profits in the trade, etc. I think the disbursements permitted are such as are made for that purpose. It is not enough "that the disbursement is made in the course of, or arises out "of, or is connected with, the trade, or is made out of the profits "of the trade. It must be made for the purpose of earning the "profits." This explanation has always been regarded as authoritative and is difficult to reconcile with the respondents' contention. But I think that the matter is put beyond doubt by the reasons given by the majority in this House in *Smith's Potato Estates Ld. v. Bolland*.²⁷ In that case an increase of salary to a servant of a subsidiary company had been disallowed for the purpose of excess profits tax. There was a successful appeal against this disallowance and the companies contended that the costs incurred in prosecuting this successful appeal were an admissible deduction for income tax and excess profits tax purposes. Section 18 of the Finance (No. 2) Act, 1939, makes the amount of excess profits tax a good deduction for income tax purposes but did not cover the sum expended in this case, so the case turned on the proper interpretation of rule 3 (a). Viscount Simon and Lord Oaksey dissented. If their opinion had prevailed I think that there would have been much to be said for

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²⁵ [1906] A.C. 448.²⁷ [1948] A.C. 508.²⁶ *Ibid.* 453.

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the respondents in this case. Viscount Simon said ²⁸: " Since
 " excess profits tax is deductible as an expense when calculating
 " the proper assessment of the trader to income tax, the fixing
 " of a correct figure for the former is essential to the correct
 " calculation of the latter. And it is only when the latter is
 " ascertained that the trader knows how much of his commercial
 " profit he can carry forward, or, if a company, how much of
 " the year's profit is available for dividend or for reserve. . . .
 " Here the expenditure was, in my view, incurred for the purpose
 " of carrying on and earning profits in the trade, for a reduction
 " in the amount of tax does increase the fund in the trader's
 " hands after tax is paid and so promotes the carrying on of the
 " trade and the earning of trading profits." Lord Oaksey said ²⁹:
 " It is an incident which he may think reasonably necessary for
 " the purposes of his trade to engage in litigation as to the
 " amount of his taxes. If he succeeds in either case he increases
 " the profits arising from his trade and it appears to me to be no
 " straining of language to say that a trader who increases his
 " profits by incurring a certain expense incurs that expense for
 " the purposes of his trade." These expressions of opinion do
 not appear to me to be very far removed from the admission
 made for the Crown in *Stevens'* case,³⁰ to which I have already
 referred, and they would, I think, at least open the door for the
 respondents' argument that payment of taxes in Eire was a
 necessary incident of their earning profits in the United Kingdom
 and therefore a proper deduction. But I cannot reconcile the
 respondents' contention with the opinions expressed by the
 majority in *Smith's Potato Estates Ltd. v. Bolland*.³¹ Lord
 Porter said, with reference to the expense of an appeal for the
 purpose of discovering the true measure of profits for tax purposes
³²: " Such expenditure is incurred directly for tax purposes
 " and for nothing else, though it may indirectly affect both the
 " amount available for distribution to the proprietors of the
 " business and that proper to be put to reserve," and later he
 said, with regard to excess profits tax ³³: " It is true that a trader
 " only is liable to pay it, but it is not payable by him as a trader.
 " He pays as an individual, like any other individual, tax on the
 " sum which he has earned as a trader. 'To my mind,' said
 " Lord Selborne L.C. in *Mersey Docks and Harbour Board v.*

²⁸ [1948] A. C. 508, 516-8.³¹ [1948] A.C. 508.²⁹ Ibid. 532-3.³² Ibid. 521.³⁰ 100 L.T. 481; 5 Tax Cas. 402.³³ Ibid. 523.

"*Lucas*,³⁴ 'it is reasonably plain that the gains of a trade are
 " 'that which is gained by the trading, for whatever purposes it
 " 'is used,' and therefore what your Lordships have to determine
 " is whether the expense is incurred in order to earn gain or in
 " the application or distribution of that gain when earned.'
 Lord Simonds said³⁵: "Neither the cost of ascertaining taxable
 " profit nor the cost of disputing it with the Revenue authorities
 " is money spent to enable the trader to earn profit in his trade.
 " What profit he has earned, he has earned before ever the voice
 " of the taxgatherer is heard. He would have earned no more
 " and no less if there was no such thing as income tax. . . .
 " Let me suppose that a trader, having been assessed to income
 " tax in the sum of £X in a certain year, disputed the assess-
 " ment, claiming that his taxable profit is not £X but a lesser
 " sum, say £Y. Suppose further that he succeeded in his claim.
 " I fail to see how he has by the expenditure that he incurred
 " earned profit in his trade. His taxable profit has been reduced:
 " that was the object of his expenditure. But what has this to
 " do with his trading profit?" Lord Normand, dealing with the
 reason why income tax is not deductible in computing profits for
 income tax purposes, said³⁶: "There is the more substantial
 " reason, that income tax is an impost made upon profits after
 " they have been earned, and that unless the observations of Lord
 " Davey in *Strong & Co. of Romsey Ld. v. Woodifield*,³⁷ which
 " have often been referred to and applied in later cases, are to
 " be disregarded, a payment out of profits after they have been
 " earned is not within the purposes of the trade carried on by the
 " taxpayer. But excess profits tax also is levied on profits after
 " they are earned and, apart from the statutory provision, is in
 " *pari casu* with income tax."

My Lords, I trust that I have not misrepresented the speeches
 of noble Lords by giving these short extracts from them. I have
 read and re-read those speeches and they appear to me to establish
 conclusively (first) the distinction between money spent to earn
 profits and money spent out of profits which have been earned,
 and (secondly) the fact that income tax and excess profits tax
 payments come within the latter category. I have not dealt
 separately with national defence contribution or its equivalent in
 Eire, but there was no argument that this can be distinguished
 from the other two taxes for the purpose of this case. It is true

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³⁴ (1883) 8 App.Cas. 891, 905.³⁶ *Ibid.* 530.³⁵ [1948] A.C. 508, 527.³⁷ [1906] A.C. 448, 453.

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that the payments which the respondents seek to have allowed as deductions were payments of Eire taxes and not of United Kingdom taxes, but the parties have admitted that the relevant legislation in Eire corresponds to that in the United Kingdom, and I cannot see that there is any distinction in principle between them for present purposes. Certainly no authority for any such distinction was cited. It therefore appears to me to be established that there is not and never was any right under the principles applicable to Case I to deduct income tax or excess profits tax, British or foreign, in computing trading profits.

There remains the question whether the provisions of Sch. VII to the Finance (No. 2) Act, 1939, adapting income tax principles for the purposes of excess profits tax, have enacted any such right for the first time. I have said that I think that the terms of paragraphs 5 and 8 indicate a belief that some such right already existed under Case I, but for the reasons I have given I am bound to hold that that belief was erroneous. So the question is whether the terms of those paragraphs are such as merely to indicate a belief or whether they can be interpreted as enacting by implication that which Parliament, having its erroneous belief, did not find it necessary to enact expressly. In such circumstances I would not be averse to holding that there was an enactment by implication, but first I must be able to discover precisely what Parliament's belief was. Section 30 of the Finance Act, 1940, may well contain such an enactment; it is there made clear that Parliament believed that there was already a right to a certain deduction and the scheme of the section will not work unless there is such a right, so it is not difficult to imply the enactment of that right. But the whole section is limited to cases which are covered by an Order in Council and it is not possible to imply any enactment which goes beyond the scope of the section. There has been no Order in Council which could apply to the present case, and therefore, in my judgment, even if section 30 were held to contain by implication an enactment authorizing deductions such as those claimed by the respondents, that would not help them as they are outside the scope of the section.

Then it was said that an enactment allowing the deduction ought to be implied because without it there will be great injustice. If taxpayers have to pay excess profits tax in two countries without being entitled to such a deduction they may have to pay in taxation much more than their total profits. That is true and I think that it has long been recognized by Parliament that applying the rigour of income tax principles to such cases is

unjust. There is a whole series of statutory provisions designed to remove or at least mitigate this injustice in particular cases of double taxation. But it is the respondents' misfortune that there is no such provision applicable to them for the years in question. They can only obtain relief if there is some general provision in their favour and instead of enacting any such provision Parliament had, at least until 1939, preferred to deal with the matter otherwise.

The question is therefore narrowed down to this: does paragraph 5 of the schedule to the Act of 1939, reinforced by paragraph 8, contain or require the implication of an enactment that certain dominion taxes are to be deductible in computing profits for United Kingdom excess profits tax? I think that the question is a difficult one but I have come to be of opinion that it does not. Paragraph 5 is very misleading but to mislead a taxpayer is not the same thing as to entitle him to relief. It may well be that these paragraphs show that Parliament was under a misapprehension as to the existing law at the time, but it does not necessarily follow that if Parliament had been correctly informed it would have altered the law. It is one thing to leave an old deduction untouched and quite another thing to enact for the first time a new deduction of a new kind. If paragraph 5 were held to have enacted a new deduction several difficult questions would arise. That paragraph only refers expressly to dominion income tax. Would the implied enactment be limited to dominion income tax or would it also extend to excess profits tax, at least where that is assessed on income tax principles? And would it extend also to foreign income tax, as does Case IV, rule 1? Moreover the present case is an example of a puzzling situation which would arise if the respondents were right. It is admitted that tax in Eire is assessable on the same principles as in the United Kingdom. So, if the respondents are right here, they would have been entitled in Eire to a deduction of United Kingdom excess profits tax payable by them. The amount of tax payable in the one country could not be determined until the amount of the deductions allowable there had been determined, but one deduction would be the amount of tax payable in the other country. The amount of tax payable in the other country could not be determined until the deductions allowable there had been determined, but one of those deductions would be the amount of tax payable in the first country. I see no way in which this circle could be broken. Parliament provided for this difficulty in section 30 (1) of the Act of 1940, which I have quoted; but, as I have said,

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that section cannot apply to this case, and I cannot see how any appropriate provisions to deal with this matter could be read into the Act of 1939. For all these reasons I am unable to hold either that there was any provision before 1939 which could entitle the respondents to the relief which they claim or that there is anything in the Act of 1939 which so entitles them. I therefore agree that this appeal should be allowed.

LORD RADCLIFFE. My Lords, I agree that this appeal should be allowed. I would be content to say no more than this, but I will add a few words out of the respect that I feel for any judgment of Somervell L.J. on this subject.

Two main questions are involved in the respondents' claim to deduct a proportion of the income and profits taxes that they have paid in Eire when computing their trade profits for the purpose of assessment to excess profits tax in this country. The first question is whether such a deduction would be admissible in a computation of profits under Case I of Sch. D, apart from any special statutory rules about excess profits tax. The second question is whether there is to be found in the legislation imposing excess profits tax some rule that makes this a permissible deduction, even if it would not be so in an ordinary Case I assessment to income tax.

The first question was answered by the Special Commissioners in the affirmative. They expressed the opinion that the payment of these Eire taxes was "a necessary expense for the respondent company in carrying on part of its trade at branches in England." I think that, on the information available to them and to us, they made an error of law in expressing that opinion. I do not think that such a view was open to them having regard to the established law as to the principles that govern the ascertainment of what is a necessary expense for this purpose. Their view is in conflict with what was said by Lord Davey in *Strong & Co. of Romsey Ltd. v. Woodfield*³⁸: "It is not enough that the disbursement is made in the course of, or arises out of, or is connected with, the trade, or is made out of the profits of the trade. It must be made for the purpose of earning the profits."

In this case there is no material that makes it possible to say that these taxes (let alone any particular proportion of them) were paid for the purpose of earning such profits as were earned in the United Kingdom. There is much to be said for the criticism that

³⁸ [1906] A.C. 448, 453.

Lord Davey's speech in *Strong & Co. of Romsey Ltd. v. Woodfield*³⁸ imposes too limiting a criterion as to what is a permissible deduction by way of trade expenditure, but I do not know a wider one that is not vulnerable in other ways, and the fact is that his criterion has stood for so long and been so often applied that it has become, as it were, part of our income tax language. It led directly to the decision of the Court of Appeal in *Rushden Heel Co. Ltd. v. Inland Revenue Commissioners*,³⁹ and to the decision of this House in *Smith's Potato Estates Ltd. v. Bolland*.⁴⁰

It is true that both those decisions bore upon the question of deducting excess profits tax paid in this country in a computation of profits, and the question before us relates to a deduction of income and profit taxes paid in another country. But, once it is accepted that the criterion is the purpose for which the expenditure is made in relation to the trade of which the profits are being computed, I have been unable to find any material distinction between a payment made to meet such taxes abroad and a payment made to meet a similar tax at home. Certainly the case of *Stevens v. Durban-Roodepoort Gold Mining Co. Ltd.*⁴¹ suggests none. I think that it is no authority at all on the point that we are now considering. That point was not even argued.

The Court of Appeal in this case have based their decision mainly on the ground that Parliament has shown a clear intention in its enactments relating to excess profits tax that there should be a deduction in respect of income and profits taxes paid abroad. This intention is said to be shown in one case by paragraph 5 of Part I of Sch. VII to the Finance (No. 2) Act, 1939, which paragraph repealed subsection (4) of section 27 of the Finance Act, 1920, for the purpose of excess profits tax computations, and in the other case by section 30 of the Finance Act, 1940. I do not think that either of these provisions, on any view, shows an intention to make law or to declare law in any way that bears upon the subject of the present appeal, but I will deal with that aspect of the matter later. The first thing that strikes me about this argument as a whole is that if Parliament did really intend that for the purposes of excess profits tax there should be a different rule as to deduction of foreign taxes from that prevailing under Case I of Sch. D for the purposes of income tax, they concealed their intention with a more than Baconian obscurity. For, whereas it is explicitly provided by section 18 of the Finance (No. 2) Act, 1939, that excess profits tax is an allowable expense

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³⁸ [1906] A.C. 448.³⁹ [1948] W.N. 283; 30 Tax Cas. 298.⁴⁰ [1948] A.C. 508.⁴¹ 100 L.T. 481; 5 Tax Cas. 402.

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for the purposes of income tax and it is explicitly provided by paragraph 8 of Part I of Sch. VII that United Kingdom income tax, national defence contribution and excess profits tax are not to be allowable expenses for the purposes of excess profits tax—provisions which, necessary or unnecessary, are at least precise—the allowability of foreign taxes, if they are to be allowed, is only to be deduced from a devious chain of reasoning based on this paragraph 5. This consideration alone would lead me to think that the legislature did not intend to enact a new rule for excess profits tax as opposed to income tax on this point, although it may well be that those who framed the excess profits tax legislation supposed that foreign taxes were as much deductible for the purpose of one computation as for the purpose of the other. If they did, they were, as I have said, mistaken.

But I do not think that the repeal of subsection (4) of section 27 of the Finance Act, 1920, has any bearing on the present problem. That subsection did away with the deduction of any sum paid by way of dominion income tax, “notwithstanding anything in the “Rules applicable to Case IV or Case V of Sch. D or in any “other provision of the Income Tax Acts”; it gave in exchange the relief provided by the rest of section 27. There can be no doubt what Rules of Case IV and Case V were being referred to: they were in each case rule 1 of the Rules applicable to those respective Cases (the Case V rule being a mere echo of the Case IV rule), and they did provide for the deduction of income tax paid abroad in respect of income assessable under those Cases, and they also said that such tax could be deducted by the authority of those rules “where such a deduction cannot be made “under any other provision of this Act.” But they had been saying that and, in effect, in just those words ever since the Finance Act, 1914, s. 5, had enlarged the area of income assessable under Case IV from a remittance basis to the larger basis of income arising in the place of source. That enlargement had been accompanied by the grant of this right to deduct the foreign tax on that income, if the deduction could not be made under any other provision of the income tax code. The Income Tax Act, 1918, merely consolidated those enactments. But the “other “provision” could only be some provision that authorized a taxpayer in receipt of income “arising from securities out of “the United Kingdom, except such income as is charged under “Sch. C” (I quote the words of Case IV) to deduct tax in computing that income. I do not see how it could possibly authorize the inference that there was some statutory provision which

allowed foreign taxes to be treated as allowable expenditure for the purposes of the trade when income has to be computed under Case I of Sch. D. In truth, as is well known, allowable expenses under Case I are not so much the product of express provision as inferences from the words "the balance of the profits and gains" or inferences from the prohibited deductions which are listed in rule 3 of the Rules applicable to Cases I and II.

It remains extremely difficult to say what was actually achieved by paragraph 5 of Part I of the Finance (No. 2) Act, 1939, having regard to the requirement of section 14 (1) that the principles of computation that are to be applied are those of Case I of Sch. D, subject to the specific modifications laid down by the Act. I think, though I do not come to any final conclusion about this, that paragraph 5 was put in because of the transfer to Case I for excess profits tax purposes of certain kinds of income, such as those provided for by paragraph 6, which would normally have been assessed under Cases IV or V. However that may be, I am satisfied that there is no permissible inference to be drawn either from section 27 (4) of the Finance Act, 1920, or from paragraph 5 of Part I of Sch. VII of the Finance (No. 2) Act, 1939, as to foreign taxes being an allowable expenditure when the profits of a trade are being computed for the purposes of Case I of Sch. D. If that is so, I do not think that your Lordships need trouble further with the obscure significance of that paragraph.

The case is different when one turns to section 30 of the Finance Act, 1940. It seems to me very probable indeed that this section was framed on the basis that excess profits tax paid in any part of His Majesty's Dominions outside the United Kingdom would be an allowable expenditure in computing profits for the purposes of excess profits tax in the United Kingdom. Even that is not a certain inference, for all that the section does is to authorize an adjustment which is regulated by a calculation of what the situation would be if overseas excess profits tax were allowed. But suppose that it was in fact the assumption that this allowance could be claimed in the ordinary course, so far as overseas excess profits tax payments are concerned; still the section affords no authority for giving the allowance if it is not otherwise permissible. The only authority that it gives is one that comes into existence if an Order in Council has been made, and none has been made that governs this case. If the Order in Council has been made, then the only adjustment which Parliament allows under this section is one that gives effect to "the arrangements" covered by the Order, even though in any

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particular case the adjustment may have to be larger than the "arrangements" above would justify because of the requirement that it is not to be less favourable to the taxpayer than it would be if the overseas excess profits tax were itself deducted.

What it comes to is this. Parliament has not made any enactment that requires or authorizes the making of the allowances now claimed. It has not declared the law to be that such allowances are proper deductions. The most that can be said is that it is fairly certain that those who framed section 30 of the Finance Act, 1940, believed that such allowances ought to be given or were in fact being given (which is not always quite the same thing in this field). But if that is all that can be said, it is, with all respect to the Court of Appeal, a misuse of words to say that the Law Courts ought to give effect to the "intention" of Parliament that overseas excess profits tax should be allowed. The beliefs or assumptions of those who frame Acts of Parliament cannot make the law. Section 30 will be just as much effective in those cases when it does operate as it would be if overseas excess profits tax were not, in general, an allowable deduction, for wherever it operates it operates under the authority given by Parliament in that Act and not otherwise. This is not the first occasion on which a somewhat similar problem has been presented to your Lordships' House, and in face of the abiding complexity of income tax legislation I do not suppose that it will be the last. But if the House felt no difficulty in *Ayrshire Employers' Mutual Insurance Association Ltd. v. Inland Revenue Commissioners*⁴² in disregarding the plain, though mistaken, assumption of the legislature as to the prevailing law, I do not think that your Lordships need feel even as much embarrassment in the present case.

LORD TUCKER. My Lords, I concur.

Appeal allowed.

Solicitors: *Solicitor of Inland Revenue; Last, Sons & Fitton, for Crofton, Craven & Co., Manchester.*

⁴² 1946 S.C.(H.L.) 1; 27 Tax Cas. 331.

ATTORNEY-GENERAL FOR CANADA AND

ANOTHER APPELLANTS;

AND

HALLET & CAREY LD. AND ANOTHER . . . RESPONDENTS.

J. C.*

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May 20.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—Emergency legislation—Barley in commercial positions—Expropriation — Validity — National Emergency Transitional Powers Act, 1945 (St. Can. 1945, c. 60), s. 2 (1)—Order in Council, 1947 (P.C. 1292), s. 22.

The National Emergency Transitional Powers Act, 1945, of Canada, provides by section 2 (1): "The Governor in Council may do and authorize such acts and things, and make from time to time such orders and regulations, as he may, by reason of the continued existence of the national emergency arising out of the war against Germany and Japan, deem necessary or advisable for the purpose of— . . . (c) maintaining, controlling and regulating supplies and services, prices, transportation, use and occupation of property, rentals, employment, salaries and wages to ensure economic stability and an orderly transition to conditions of peace; . . ."

In ostensible exercise of the powers conferred by section 2 (1) of the Act of 1945, an Order in Council, P.C. 1292, was made on April 3, 1947, which provided by section 22 that "all oats and barley in commercial positions in Canada," with certain specified exceptions, "are hereby vested in the Canadian Wheat Board." The respondent, who held barley stored in various Canadian elevators, having challenged the validity of the compulsory acquisition provision of the Order in Council:—

Held, first, that it was not competent for the courts to canvass the considerations which had led the Governor in Council to deem it necessary to effect the vesting, or to ascribe to the Order in Council a purpose other than that which it professed to serve; the measures authorized were such as the Governor in Council, not the courts, deemed necessary or advisable.

Reference re Validity of Regulations in Relation to Chemicals [1943] S.C.R. 1, 12, *per* Duff C.J., applied.

Held, secondly, that the Act of 1945, by words which were neither vague nor ambiguous, on its true construction gave the Governor in Council the power to carry out what he had purported to achieve. There is no rule of construction that general words in a statute are incapable of interfering with private rights, and although the Act of 1945 did not include a specific reference to the subject of appropriation, the words "may do and authorize such acts and things, and make from time to time such orders and regulations,

* *Present*: VISCOUNT SIMON, LORD NORMAND, LORD RADCLIFFE, LORD ASQUITH OF BISHOPSTONE and LORD COHEN.

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"as he may . . . deem necessary or advisable" gave the amplest possible discretion in the choice of methods, and applying the paramount rule of interpretation that every statute must be expounded according to its manifest or expressed intention, there could not be implied an exclusion of any power in the circumstances to acquire compulsorily any piece of property.

Rex v. Halliday [1917] A.C. 260, *Re Gray* (1918) 57 S.C.R. 150, and *Co-operative Committee on Japanese Canadians v. Attorney-General for Canada* [1947] A.C. 87, applied.

Attorney-General v. Wilts United Dairies Ltd. (1921) 37 T.L.R. 884 explained.

Judgment of the Supreme Court of Canada [1951] S.C.R. 81 reversed.

APPEAL (No. 32 of 1951), by special leave, from a judgment of the Supreme Court of Canada (November 20, 1950), affirming a judgment of the Court of Appeal of Manitoba (March 10, 1949), which in turn had affirmed a judgment of the Court of King's Bench (April 19, 1948), in two actions which had been heard together.

By section 2 (1) of the National Emergency Transitional Powers Act, 1945, the Governor in Council was authorized to do such things and to make such orders and regulations as he might, by reason of the continued emergency arising out of the war against Germany and Japan, deem necessary or advisable for the purpose of, inter alia, "Maintaining, controlling and regulating "supplies and services, prices, transportation, use and occupation "of property, rentals, employment, salaries and wages to ensure "economic stability and an orderly transition to conditions of "peace." Under the powers conferred by that Act the Governor in Council passed an Order in Council, P.C. 1292, on April 3, 1947, which, by section 22, provided that all oats and barley in commercial positions in Canada, with certain exceptions, vested in the Canadian Wheat Board.

The respondent, J. Nolan, who held 40,000 bushels of barley stored in various Canadian elevators, refused to admit that the Governor in Council had any power to make a compulsory acquisition of his barley, and the two actions out of which this appeal arose were begun. In one Nolan sought to obtain possession of the documents of title from his agents; in the other the Canadian Wheat Board sued the agents for the documents of title and the warehousemen for the barley itself.

The question was whether the Order in Council, P.C. 1292, was effective to vest in the appellants the Canadian Wheat Board the property in the 40,000 bushels of barley belonging to the

respondent, and that depended on whether the power to appropriate property was given by the Act of 1945. The Court of King's Bench (Williams C.J.K.B.), the Court of Appeal of Manitoba (McPherson C.J.M., Richards, Coyne, Dysart and Adamson JJ.A.) and the Supreme Court of Canada (Rinfret C.J., Taschereau, Rand, Locke and Cartwright JJ., Kerwin and Estey JJ. dissenting) all answered that question in the negative.

The Attorney-General for Canada and the Canadian Wheat Board appealed.

J. C.

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1952. March 17, 18, 19, 20 and 24. *C. F. H. Carson Q.C.*, *H. B. Monk Q.C.*, *D. W. Mundell Q.C.* (all of the Canadian Bar) and *Gahan Q.C.* for the appellants. The question raised by this appeal is as to the validity of the Order in Council, P.C. 1292, made under the authority of the National Emergency Transitional Powers Act, 1945. The effect of the Order in Council was that (i) all barley in commercial positions in Canada was vested in the Wheat Board (section 22); (ii) the Wheat Board was to pay for the barley at the previous maximum price of 64 $\frac{3}{4}$ cents a bushel, thereby ensuring the owners a normal trading profit (section 23); and (iii) the Wheat Board was required to sell barley so vested at such prices as it considered reasonable (section 27). The Wheat Board in fact offered to resell to the former owners at the new increased selling price of 93 cents a bushel. The respondent Nolan challenged the validity of the Order in Council and instructed his agents not to deliver to the Wheat Board. The issues raised by Nolan in the two actions were (a) the constitutional validity under the British North America Act, 1867, of the Emergency Act of 1945; and (b) the validity under the Act of 1945 of the provisions of the Order in Council P.C. 1292. The constitutional validity of the Act of 1945 was not raised in the Supreme Court in the present case.

The first proposition, therefore, is that the Emergency Act of 1945 plainly conferred on the Governor in Council power to enact the provisions of the Order in Council vesting the barley in question in the Wheat Board if he deemed it necessary or advisable to do so for any of the purposes mentioned in the Act. That contention is directed to the question whether the Governor in Council had power to appropriate property, and that depends for its determination on the interpretation of the introductory words of section 2 (1) of the Act of 1945. He had power to do anything necessary or right for the purposes set out. The only limitation on the means which he may adopt is that he deems

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such steps necessary or advisable. It is difficult to conceive how Parliament could have conferred on the Governor in Council broader powers for determining what means he might adopt to achieve any of the purposes for which he was authorized to act. It has been contended by Nolan that the opening words of section 2 (1) do not authorize the appropriation of property: that contention requires those words to be interpreted to mean that the Governor in Council "may do and authorize such acts and "things . . . as he may deem necessary or advisable" except appropriate property. Section 2 (1) of course contains no such exception, and, it is submitted, there is no foundation for importing into its plain language any such exception.

Since the language is clear and unambiguous, there is no need or justification for looking outside the terms of the Act for help in interpretation: *Reg. v. Titterton*,¹ where it was said that "the "duty of the court when called upon to construe an Act of "Parliament is . . . to read the Act itself, and if its language is "clear to give effect to what the legislature has said. It is . . . "proper to refer to earlier Acts in *pari materia* only where there "is ambiguity." There is none here. To read section 2 (1) as excepting the power to appropriate would in itself have the effect of making a substantial amendment, for which there is no justification. Even if it were proper to go to the War Measures Act, 1914, as an aid to interpretation of section 2 (1) of the Act of 1945, the result of a comparison between the two Acts is, it is submitted, to support our contention that the suggested curtailment of the powers of the Governor in Council cannot properly be implied. The important point is that the general words defining what means may be adopted for achieving the authorized purposes are identical in the two Acts. The emergency under the two Acts is different. In the Act of 1945 Parliament has conferred on the Governor in Council the same broad powers, and thereafter set out the enumerated purposes. The broad general power in section 3 of the War Measures Act is in no way limited by the enumerated subjects; that view finds support in *Co-operative Committee on Japanese Canadians v. Attorney-General for Canada*,² and see also the view of Rinfret C.J. in that case when it was before the Supreme Court.³

Summing up on this first point: section 2 (1) of the Act of 1945 conferred on the Governor in Council in plain language powers that included power to appropriate property as a means

¹ [1895] 2 Q.B. 61, 67.³ [1946] S.C.R. 248, 268, 277, 284.² [1947] A.C. 87.

of carrying out an authorized purpose, and such language being plain and unambiguous there is no justification for giving to it a restricted meaning, and certainly no need or justification for turning to the War Measures Act at all as an aid to interpretation. Even if that Act is resorted to as a means of interpretation, comparison of the truly comparable parts of the two Acts in the light of the decision of the Privy Council in the *Japanese* case² supports the submission that the power includes a power to appropriate property if the Governor in Council deems it necessary or advisable to do so for one of the prescribed purposes.

The second contention is that since, as appears from the Order in Council, the Governor in Council deemed it necessary for one of the purposes mentioned in the Act to vest the barley in the Wheat Board, it was not for the court to review the decision of the Governor in Council, there having been no bad faith on his part. It is clear from the terms of the Act that Parliament left it entirely to the Governor in Council to determine the necessity of making orders under the Act, and the Governor in Council determined that it was necessary to make the present order. In this connexion—that the court could not interfere in this respect—see *Reference re Validity of Regulations in Relation to Chemicals*⁴; *Re Gray*⁵; *Reference re Validity of Orders in Council in Relation to Persons of the Japanese Race*,⁶ and the following English cases: *Rex v. Comptroller-General of Patents, Ex parte Bayer Products Ltd.*⁷; *Point of Ayr Collieries Ltd. v. Lloyd-George*⁸; *Carltona Ltd. v. Commissioners of Works*,⁹ and *Demetriades v. Glasgow Corporation*.¹⁰ Bad faith was expressly negatived in the Court of Appeal of Manitoba. In the Supreme Court of Canada Rand J. made three conclusions which, it is submitted, give support to the order: (i) that the Governor in Council had not exceeded his authority conferred on him by the Act; (ii) that the court should not attempt to substitute its judgment for that of the Executive, and (iii) that there was no bad faith on the part of the Governor in Council and he had not been guilty of misrepresenting his purpose.

There is really only one question: did the Act of 1945 give the power? If so, there would seem to be no question left because, on the authorities cited, once the Governor in Council deems it

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² [1947] A.C. 87.⁴ [1943] S.C.R. 1, 12, 18.⁵ (1918) 57 S.C.R. 150, 170, 178.⁶ [1946] S.C.R. 248, 277, 284.⁷ [1941] 2 K.B. 306, 314.⁸ [1943] 2 All E.R. 546, 547.⁹ [1943] 2 All E.R. 560.¹⁰ [1951] 1 All E.R. 457, 460-1.

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necessary, the court cannot interfere with the determination. [Reference was also made to *Powell v. Apollo Candle Co.*¹¹]

John A. MacAulay Q.C., G. E. Tritschler Q.C. and B. McGavin (all of the Canadian Bar) for the respondent *Nolan*. *MacAulay Q.C.* referred to the detailed facts, to the general scheme relating to barley and to relevant evidence to indicate what, in his submission, the position was when the Order in Council was passed. It will be seen from the evidence that no documents of title were delivered to the Wheat Board, but that the holders of barley in commercial positions simply gave to the Wheat Board their cheques for the difference in price before and after March 17, 1947. Had there been a shortage of barley, it would have been expected that all the barley would have been taken over, but actually only a certain portion was taken over. No emergency existed—there was no shortage of barley in Canada on March 17, 1947. There was no evidence of supervision of sales or of directions given by the Wheat Board, with small immaterial exceptions. The real purpose, it is submitted, was not an authorized purpose of the Order in Council. The expressed purpose was for “maintaining, controlling and regulating,” etc., but the real purpose was to take away certain profits which the owners of the barley would have made as the result of the increased price ceiling.

Tritschler Q.C. following. The first submission is that the Order in Council exceeds the authority granted to the Governor in Council for the reason that appropriation is not authorized by the statute. The Order in Council attempted outright expropriation of *Nolan*’s barley, and the Transitional Powers Act conferred no power to carry out such action. The words relied on by the appellants as conferring that power are the opening words of section 2 (1) of the Act: they said that that language includes a power to appropriate property, that it is clear and unambiguous, and that there is no need or justification to look outside the terms of the Act to help in interpretation. It is submitted that the words cannot be interpreted in their literal meaning, and that when interpreted in accordance with established rules of construction it becomes apparent that they do not include the right to appropriate property. It is established that words as general as these must be limited to the subject-matter which was in the mind of the legislature: *Maxwell on Interpretation of Statutes*, 9th ed., p. 63. What was the intention of the legislature in this

¹¹ (1885) 10 App.Cas. 282, 288, 290.

case? The majority of the judges in the Supreme Court found that it was to exclude the power to appropriate property.

One accepted method of ascertaining intention is to examine the state of the law before the statute to be construed was passed, and also the provisions of any other Act in *pari materia*: Maxwell, 9th ed., pp. 22 and 39. The Transitional Act and the War Measures Act are in *pari materia*; they both deal with different phases of the same continuing emergency arising out of the war—there are not different emergencies. From the preambles to the two Acts it appears that the powers in the Transitional Act need not be so drastic; the emergency was the same, but the power necessary to deal with the peace time conditions was much less extensive than was necessary to deal with the war. In the War Measures Act Parliament did think that it was necessary by specific words to confer power to appropriate property. That Act has been the source of the Dominion power in two wars, and it is submitted that the departure in the Transitional Act from the wording which had been previously used in the War Measures Act must be given some meaning. Parliament must be taken to have intended a result other than that which would have followed from a repetition of the pattern of the War Measures Act. As the Transitional Act contained no specific provision for appropriation and no provision for compensation, some result ought to be drawn from that, and the omission of those provisions indicates clearly that Parliament did not intend to include in the Transitional Act a right so fundamental as appropriation. Had it so intended it would have said so. A comparison of the two Acts shows that Parliament intended to withhold from the Governor in Council certain fundamental powers.

[Counsel sought to put in the bill which became the Transitional Act, and, on objection being taken for the appellants, referred to the following cases in support of his right to do so in a constitutional case: *In re Provincial Fisheries*¹² and *Re Gray*¹³; but he was directed by the Board not to continue with that point.]

It is agreed that the general power in the War Measures Act is not limited by reference to the particularly enumerated powers. It is only limited to the more general purposes for the peace, order, etc., of Canada. Secondly, it is submitted that the general power given to the Governor in Council by the opening words of section 2 (1) of the Transitional Act is not at all in identical

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¹² (1895) 26 S.C.R. 444.¹³ 57 S.C.R. 150, 180.

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language with the general power in the War Measures Act—it is restricted to much narrower purposes. Thirdly, it does not follow because the enumerated particular powers of the War Measures Act do not restrict the general power that the totality of powers granted by the War Measures Act would have been as large if the enumerated powers had not been included. The general power conferred by the Transitional Act is very definitely limited by the omission from the Transitional Act of the special or particular powers of appropriation or forfeiture of property. It was said in *Re Gray*¹⁴ that “the specification should be deemed “to be of cases in which there might be such doubt as to whether “they fell within the ambit of the general terms—wide as they “are—that *ex abundanti cautela* it was safer to mention them “specifically.” The powers of arrest, etc., which were in section 3 (b) of the War Measures Act are omitted from the Transitional Act, so why should not the power of appropriation also be taken to have been intentionally omitted.

That the powers of the Transitional Act are not intended to include the power to appropriate property is further supported by the emphasis which is placed in the Transitional Act on the discontinuance of the emergency measures; as was said by Estey J. in the *Japanese Reference* case¹⁵: “Parliament did recognize “that the intensity and magnitude of the emergency had changed “and diminished and under the provisions of this Act [the Transitional Powers Act] curtailed the extensive powers exercised “by the Governor in Council under the War Measures Act.” Further, statutes ought not to be construed as taking away property rights of the subject unless their language makes the intention abundantly clear: Maxwell, *Interpretation of Statutes*, 9th ed., p. 289; *Western Counties Railway Co. v. Windsor and Annapolis Railway Co.*¹⁶; *Attorney-General v. Horner*,¹⁷ and *Consett Iron Co. v. Clavering Trustees*.¹⁸ Nor should statutes be interpreted as authorizing forfeiture without compensation. The answer cannot be that if the Governor in Council has deemed it necessary therefore it must be within the ambit of his power. [Reference was made to *The Japanese Reference* case¹⁹ and to *Attorney-General v. Wilts United Dairies*.²⁰] Unless the power to appropriate is given by clear and unambiguous words it should not be read in by

¹⁴ 57 S.C.R. 150, 177.¹⁵ [1946] S.C.R. 248, 313.¹⁶ (1882) 7 App.Cas. 178, 188.¹⁷ (1884) 14 Q.B.D. 245, 256-7.¹⁸ [1935] 2 K.B. 42, 65.¹⁹ [1947] A.C. 87.²⁰ (1921) 37 T.L.R. 884, 886.

implication. The act done by a person to whom it is delegated must be within the ambit of the power: *Re Gray* ²¹; the *Japanese Reference* case ²²; Halsbury's Laws of England, 2nd ed., vol. 31, p. 467, and *Lower Mainland Dairy Products Board v. Turner's Dairy Ltd.* ²³ In *Attorney-General v. Wilts United Dairies* ²⁴ it was said that the powers were extensive, but that they did not go far enough to impose taxation.

As to the appellants' contention that "it is difficult to conceive how Parliament could have conferred on the Governor "in Council broader powers," one has only to look to the War Measures Act, and even the dissenting judges below agreed that there was meant to be less power in the Transitional Act. If Parliament had intended to confer the power to appropriate property it would have said so in clear and express words and put it beyond reasonable doubt. This was an impost imposed as a condition of being permitted to retain one's own property: *Les Ecclesiastiques de St. Suplice de Montreal v. City of Montreal* ²⁵ and *Powell v. Apollo Candle Co.* ²⁶—the latter is not authority for the proposition that taxation can be levied by the Transitional Act.

If, however, there is power in that Act to appropriate property, the power was not being used for the purpose stated, but for another and unauthorized purpose—to appropriate the entire barley in question under a power to regulate and control supplies and prices. The court is not bound to accept the stated purposes and may inquire fully: the *Japanese Reference* case, ²⁷ where it was said that "the only question is whether there is apparent "any matter which justifies the judiciary in coming to the conclusion that the power was in fact exercised for an unauthorized "purpose." That suggestion by the appellants that the court cannot inquire, coupled with the claim that the Governor in Council has unlimited power of control as necessary for this limited purpose, is a claim to absolute power, which Parliament did not in any of our statutes intend to convey, especially in the Transitional Act. The action deemed did not control and maintain and regulate supplies and prices, which was intended, and therefore the Order in Council could not be for the stated purposes, but for other purposes. It was used for the purpose of taking what the appellants called a "gratuitous profit"; that was not an authorized purpose. The Governor in Council misconceived

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²¹ 57 S.C.R. 150, 157.

²² [1947] A.C. 87, 102.

²³ [1941] S.C.R. 573, 577.

²⁴ (1922) 91 L.J.K.B. 897, 900.

²⁵ (1889) 16 S.C.R. 399, 403.

²⁶ 10 App.Cas. 282, 286.

²⁷ [1947] A.C. 87, 108.

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its power. [Reference was made to *In re Price Bros. and the Board of Commerce of Canada*.²⁸] Had Parliament intended to deal with the question of capturing profits it would have said so in plain words; that was a function of income tax. The courts look wherever possible for the evidence of the true purpose and real intent of the legislation: *Rex v. Comptroller-General of Patents*²⁹; the *Price Bros.* case³⁰; the *Chemicals Reference* case,³¹ and *Reference as to the Validity of the Wartime Leasehold Regulations*.³²

English cases on "deeming" are distinguishable; they all find their authority in the Emergency Powers (Defence) Act, 1939; that Act is comparable with the War Measures Act and cannot be compared with the Transitional Act in point of strength: next, the orders were made in war-time; also it seems to have been conceded that they were within the ambit of the statute, and, of course, in none of them was there any actual taking of private property: *Point of Ayr Collieries Ltd. v. Lloyd-George*³³; *Carltona Ltd. v. Commissioners of Works*,³⁴ and *Demetriades v. Glasgow Corporation*.³⁵ It does not matter what is "deemed"; the court can still see that the power is one which falls within the power conferred by the Act. In *Liversidge v. Sir John Anderson*³⁶ there was no evidence to show that the power had been used for an unauthorized purpose; it was a war-time matter, and it was a preliminary proceeding in an action. [Reference was also made to *Greene v. Home Secretary*³⁷ and to *Rex v. Halliday*.³⁸] If it is demonstrated to the court by evidence that the real purpose is not the stated purpose, the court will take notice of that.

Next, where any Dominion legislation trenches on property and civil rights in the province it can be justified on what has been known as the emergency doctrine. The true test was laid down in *Fort Frances Pulp and Paper Co. v. Manitoba Free Press Co.*³⁹: "The general control of property and civil rights "for normal purposes remains with the Provincial Legislatures. "But questions may arise by reason of the special circumstances "of the national emergency which concern nothing short of the "peace, order and good government of Canada as a whole," and in a sufficiently great emergency there was power in the

²⁸ (1920) 60 S.C.R. 265, 280.²⁹ [1941] 2 K.B. 306, 316.³⁰ 60 S.C.R. 265, 272.³¹ [1943] S.C.R. 1, 13, 23.³² [1950] S.C.R. 124, 141.³³ [1943] 2 All E.R. 546, 547.³⁴ [1943] 2 All E.R. 560, 564.³⁵ [1951] 1 All E.R. 457, 461-3.³⁶ [1942] A.C. 206.³⁷ [1942] A.C. 284.³⁸ [1917] A.C. 260, 270-2.³⁹ [1923] A.C. 695, 704.

Dominion to deal with it for the safety of the Dominion as a whole: see also *Attorney-General for Ontario v. Canada Temperance Federation*.⁴⁰ The act attempted here, however, was not one which affected the interests of Canada as a whole—it did not affect the whole grain trade, and was therefore a local or private matter, and was in relation to property and civil rights in the province. If in its pith and substance this legislation was not in relation to a general emergency, but was really an interference with property and civil rights in the province, and was not justified by any emergency which affected the interests of Canada as a whole, then it cannot stand. The courts have always proceeded with caution to increase the Federal power: *Attorney-General for Ontario v. Attorney-General for the Dominion*⁴¹ and *Reference re the Natural Products Marketing Act, 1934*.⁴² Applying the tests in the *Fort Frances* case⁴³ and the *Canada Temperance* case⁴⁴ this Order in Council is not valid Dominion legislation on the facts; it ought to be strictly interpreted and so as not to authorize the interference with fundamental rights. The judgments below ought not to be disturbed.

C. F. H. Carson Q.C. in reply. The only comparable parts of the War Measures Act and the Transitional Act are the opening words of section 3 (1) of the former and of section 2 (1) of the latter Act, and the opening words of the two are the same. The Governor in Council under either Act has the same broad powers to make such orders as he may deem necessary or advisable. Once the Governor in Council determines that something should be done for an authorized purpose then he may under either Act make whatever orders he deems necessary or advisable to serve such a purpose, and he can, it is submitted, under either Act appropriate property. [Reference was made to *Warner Quinlan Asphalt Co. v. The King*.⁴⁵] Appropriation for the purposes of control would be a valid exercise of power under the general words. Deportation of British subjects was undoubtedly covered by the general words of the War Measures Act (the *Japanese Reference* case⁴⁶), and in that case what was being dealt with, in the view of this Board, was the deprivation of the liberty of the subject. For the respondent it was said that the general words are not sufficient to give power to encroach on any fundamental rights. The War Measures Act was held wide enough to

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⁴⁰ [1946] A.C. 193, 206.⁴⁴ [1946] A.C. 193.⁴¹ [1896] A.C. 348, 361.⁴⁵ [1924] S.C.R. 236, 245-6.⁴² [1936] S.C.R. 398, 422.⁴⁶ [1946] S.C.R. 248, 277; [1947]⁴³ [1923] A.C. 695.

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do so, and the same words in the Transitional Act should be construed in the same way in the light of the *Japanese Reference* case.⁴⁶ [Reference was also made to *Attorney-General v. Wilts United Dairies Ltd.*⁴⁷] The Transitional Act should be construed as capable of conferring every power falling within the words used which it is conceivable that the Governor in Council might require to use in that emergency. There is nothing in the changed character of the emergency to warrant any deduction that identical words in the two Emergency Acts should bear a different meaning.

May 20. The judgment of their Lordships was delivered by LORD RADCLIFFE. This is an appeal, by special leave, from a judgment of the Supreme Court of Canada dated November 20, 1950. That judgment disposed of appeals in two separate actions which had been started in the Court of King's Bench for Manitoba, but the result of each action depends on the answer to the same question, whether an Order of the Governor General in Council, P.C. 1292, made on April 3, 1947, was effective to vest in the appellants, the Canadian Wheat Board, the property in 40,000 bushels of barley belonging to the respondent Nolan.

The three courts in Canada before which this question has come, the Court of King's Bench, the Court of Appeal for Manitoba and the Supreme Court of Canada, have all answered this question in the negative, though not always for the same reasons, and in the Supreme Court the opinions of two judges, Kerwin and Estey JJ., were in favour of the Wheat Board's claim to title. The Order in Council was made in ostensible exercise of the powers conferred on the Governor General in Council by the National Emergency Transitional Powers Act, 1945, and there can be no dispute that, if those powers included a power to acquire property compulsorily, the provisions of paragraph 22 of the Order applied to the respondent Nolan's barley and vested it in the Board. The constitutional authority of the Dominion Parliament to enact the National Emergency Transitional Powers Act, 1945 (which, for brevity, will be referred to as "the Act of 1945") is not challenged, whatever may be the true range and limit of the powers that it gives, and the whole issue, difficult and important as it is to solve, thus comes down to the problem of placing the right construction on the very general language employed by this Act of 1945.

⁴⁶ [1946] S.C.R. 248, 277; [1947] A.C. 87, 101.

⁴⁷ (1921) 37 T.L.R. 884, 886; 91 L.J.K.B. 897, 900.

Any consideration of the Act of 1945 must begin with a reference to the War Measures Act, 1914, which had been the main general source of emergency executive authority during the war of 1939-45. This Act is referred to in the Act of 1945, which to some extent continues the operation of its exceptional powers, and it forms a part of the legislative background against which the provisions of the later enactment must be placed. It would be legitimate, therefore, to interpret the provisions of the later Act in the light of those of the earlier one, if a comparison of the two justified any sound deduction as to the intention of Parliament as expressed in the words of the later Act. Their Lordships have had to consider in a passage of this opinion whether the particular deductions that have commended themselves to the Court of Appeal for Manitoba and to the majority of the judges of the Supreme Court are well founded for this purpose.

The War Measures Act conferred on the Governor General in Council very extensive authority. By section 3 it declared that he might do and authorize such acts and things, and make from time to time such orders and regulations "as he may, by reason of the existence of real or apprehended war, invasion or insurrection deem necessary or advisable for the security, defence, peace, order and welfare of Canada." The section then went on to declare "for greater certainty, but not so as to restrict the generality of the foregoing terms," that the Governor General's powers extended to "all matters coming within the classes of subjects" then enumerated, and there followed a list of subjects, of which "arrest, detention, exclusion and deportation" was one, and "appropriation, control, forfeiture and disposition of property and of the use thereof" was another. Later sections prescribed that all orders and regulations made under section 3 should have the force of law, but only during war, invasion or insurrection, real or apprehended; and a section, section 7, under the heading of the fasciculus "Procedure," provided that "whenever any property or the use thereof has been appropriated by His Majesty under the provisions of this Act, or any order in council, order or regulation made thereunder, and compensation is to be made therefor and has not been agreed upon" the claim was to be referred to and adjudicated upon in the Exchequer Court.

The Act of 1945 came into force on January 1, 1946, and one of its sections declared that on and after the same day the war against Germany and Japan should be deemed no longer to exist,

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so far as concerned the purposes of the War Measures Act. There was a preamble to the Act, the words of which have been much canvassed in some of the judgments delivered in the courts in Canada, and it is desirable to set out in full the contents of the preamble and of section 2 (1) which conferred new powers on the Governor in Council:—

“Whereas the War Measures Act provides that the Governor in Council may do and authorize such acts and things, and make from time to time such orders and regulations, as he may by reason of the existence of real or apprehended war deem necessary or advisable for the security, defence, peace, order and welfare of Canada; and whereas during the national emergency arising by reason of the war against Germany and Japan measures have been adopted under the War Measures Act for the military requirements and security of Canada and the maintenance of economic stability; and whereas the national emergency arising out of the war has continued since the unconditional surrender of Germany and Japan and is still continuing; and whereas it is essential in the national interest that certain transitional powers continue to be exercisable by the Governor in Council during the continuation of the exceptional conditions brought about by the war and it is preferable that such transitional powers be exercised hereafter under special authority in that behalf conferred by Parliament instead of being exercised under the War Measures Act; and whereas in the existing circumstances it may be necessary that certain acts and things done and authorized and certain orders and regulations made under the War Measures Act be continued in force and that it is essential that the Governor in Council be authorized to do and authorize such further acts and things and make such further orders and regulations as he may deem necessary or advisable by reason of the emergency and for the purpose of the discontinuance, in an orderly manner as the emergency permits, of measures adopted during and by reason of the emergency: Therefore . . .

“2.—(1) The Governor in Council may do and authorize such acts and things, and make from time to time such orders and regulations, as he may, by reason of the continued existence of the national emergency arising out of the war against Germany and Japan, deem necessary or advisable for the purpose of—

“ (a) providing for and maintaining the armed forces of

“Canada during the occupation of enemy territory and demobilization and providing for the rehabilitation of members thereof;

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“(b) facilitating the readjustment of industry and commerce to the requirements of the community in time of peace;

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“(c) maintaining, controlling and regulating supplies and services, prices, transportation, use and occupation of property, rentals, employment, salaries and wages to ensure economic stability and an orderly transition to conditions of peace;

“(d) assisting the relief of suffering and the restoration and distribution of essential supplies and services in any part of His Majesty's Dominions or in foreign countries that are in grave distress as the result of the war; or

“(e) continuing or discontinuing in an orderly manner, as the emergency permits, measures adopted during and by reason of the war.”

One or two other provisions of the Act may be shortly referred to. Orders and regulations made under it were to have the force of law while the Act was in force: but every Order in Council was to be laid before Parliament within a short space of time after being made and was liable to be annulled by a joint resolution of both Houses, without prejudice, however, to its previous operation. There was a separate power given to the Governor in Council to continue for the duration of the Act any existing orders and regulations which had been lawfully made under the powers of the War Measures Act. Lastly, the Act was to expire on December 31, 1946, subject to extension for a further period up to one year if each House so requested by address presented to the Governor General and the Governor in Council so ordered. Thus, though the Governor in Council was given far-reaching powers, Parliamentary control over any order that he might make was retained to an extent that had not been provided for under the War Measures Act. This difference should be kept in mind when arguments are founded on a comparison between the contents of the two Acts.

Since the outbreak of war in 1939 Orders in Council had been made under the authority of the War Measures Act for the purpose of regulating and controlling certain aspects of the general economy of Canada. A Wartime Prices and Trade Board had been set up and that Board issued regulations “to provide safeguards under war conditions against any undue

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“enhancement in the prices of food, fuel and other necessities of life and to insure an adequate supply and equitable distribution of such commodities.” (The judgment of Kerwin J. in the Supreme Court gives this summary of the position: a further statement to the same effect is contained in the judgment of Rand J.) Both oats and barley had been involved in the system of control; a maximum or ceiling price had been imposed; a floor or support price had been fixed at which the Wheat Board was to buy all oats or barley offered; and export from Canada was forbidden except under licence. On March 17, 1947, the maximum price for barley was 64½ cents per bushel, with the support price a few cents lower. The Board had formed the decision, in accordance with the policy of the Executive Government, that these prices ought to be raised to a much higher level, since the Canadian controlled prices were much below current world prices, and acting through its powers as an administrator under the Wartime Prices and Trade Board it fixed a new maximum price for barley of 93 cents per bushel as from March 18, 1947. The authority for this new maximum was contained in a document entitled “Instructions to Trade No. 59,” which was circulated to the members of the grain trade on March 17. This increase in the permitted price of barley did not stand alone. It was accompanied by a new support price based on 90 cents per bushel for No. 1 feed grade, by increases in the maximum and support prices of oats, and by the expropriation of Western Canada oats and barley “in commercial positions” at the old maximum prices ruling on March 17. The legal authority for the new support prices and the expropriation was contained in the Order of the Governor in Council, P.C. 1292, which is now in question, not in “Instructions to Trade” issued by the Board, but their Lordships do not think that any useful purpose is served by a detailed analysis of the respective dates and sources of these various measures, since there is no doubt that each formed part of a single administrative plan. Nor do they think that there is any need to deal with the legal questions involved without taking cognizance of the fact that the Government’s announced purpose in making these expropriations was to “avoid the fortuitous profits to commercial holders of oats and barley that would otherwise result from” its action in raising the controlled prices. A copy of the government announcement formed part of Instructions to Trade No. 59, which fixed the new maximum prices; and in any event it has been referred to in so many of the judgments under review

that it cannot but be treated as a relevant part of the case. Consistently with this purpose the Wheat Board gave to the expropriated holders an option immediately to repurchase their holdings at the higher prices, in the case of barley at 93 cents per bushel for all grades. Thus holders who decided to exercise the option could recover the ownership of their stocks at the cost of forfeiting so much potential profit as was equivalent to the difference between the old maximum price and the new: the Wheat Board acquired no more additional stocks than such as might not be taken back under the options, but realized a profit on those taken back at the rate of $28\frac{1}{4}$ cents per bushel. It was required by the Order in Council to pay this profit into the consolidated revenue fund.

Section 22 of the Order in Council provided for the expropriation. It ran as follows: "All oats and barley in commercial positions in Canada, except such oats and barley as were acquired by the owners thereof from the Canadian Wheat Board or from the producers thereof on or after the 18th day of March, 1947, are hereby vested in the Canadian Wheat Board."

The following section required the Wheat Board to pay for the expropriated property at the old maximum price. "Oats and barley in commercial positions" were defined as meaning oats and barley which were not the property of the producer and were in store in warehouses, elevators or mills or in other storage or transportation facilities. The terms "oats" and "barley" were themselves confined to oats and barley grown in Western Canada.

The respondent Nolan was an owner of barley affected by this provision. He had been holding 40,000 bushels since 1943. The barley was stored in various Canadian elevators, and warehouse receipts covering it were in the hands of his agents, the respondents Hallett & Carey Ltd. From the first he refused to admit that the Governor in Council had any power to make a compulsory acquisition of his barley, and the two actions with which this appeal is concerned are the consequence. In one he seeks to obtain possession of the documents of title from his agents; in the other the Wheat Board is suing the agents for the documents of title and the warehousemen for the barley itself. During the course of proceedings the barley was sold under the directions of the court, and the dispute now turns on the question which party is entitled to receive the moneys that represent its proceeds.

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J. C. The respondents Hallett & Carey Ltd. have not been represented
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The validity of the vesting provision of the Order in Council has been attacked on several grounds. It has been said that its "real" purpose was not to carry out any of the purposes specified in the Act of 1945 but to confiscate the profits that would otherwise have been made by a certain class of owners of barley or to exact an impost from them. It has been said that the order was not in fact necessary for or related to any of the purposes of the Act and was therefore not a valid exercise of any of the powers which the Act conferred. It has been said that the order was invalid because it discriminated against some out of the whole body of citizens or of barley owners and that the authority given by the Act did not extend to the making of such discrimination. All these are views that found favour with one or more of the members of the Court of Appeal for Manitoba, and they constitute a different class of objection from those which are more properly related to the construction of the enabling Act itself, for, however expressed, they are in reality an attempt by the court to take over into its own hands the functions which have been entrusted by Parliament to the Governor in Council. This is, in their Lordships' view, an inadmissible proceeding.

The orders that are valid under the Act are such orders as the Governor in Council may by reason of the continued existence of the emergency deem necessary or advisable for any of the specified purposes. The preamble of this order states that it is necessary by reason of the continued existence of the emergency to effect the vesting in the Wheat Board of such holdings as are now in question "for the purpose of maintaining, controlling and "regulating supplies and prices, to ensure economic stability and "an orderly transition to conditions of peace." How, then, can a court of law decide that the vesting was for another and extraneous purpose or hold that what the Governor in Council has declared to be necessary is not in fact necessary for the purposes he has stated? There is no warrant at all for presenting this as a case in which powers entrusted for one purpose are deliberately used with the design of achieving another, itself unauthorized or actually forbidden. If bad faith of that kind can be established, a court of law may intervene: see, for instance, *Lower Mainland Dairy Products Board v. Turner's Dairy Ltd.*⁴⁸ To speak of the "real purpose" of this order as

⁴⁸ [1941] S.C.R. 573.

being that of confiscating profits is to confuse means with ends, for the true question is whether it can be said that the Governor in Council could not have deemed it necessary to take this step as a means incidental to the realization of the purposes stated in this order. Clearly he could. Government authority which had hitherto depressed, was now to raise prices, and those responsible might well feel that they must accompany this action with a requisition of some of the profits that they thus created. Nor is this a case in which the order shows on the face of it a misconstruction of the enabling Act or a failure to comply with the conditions which that Act has prescribed for the exercise of its powers. On the contrary, the order shows on its face compliance with those conditions, and the problem considered by Clauson L.J. in *Rex v. Comptroller-General of Patents*⁴⁹ and by Duff C.J. in *Reference as to the Validity of Certain Chemical Regulations*⁵⁰ is not therefore a present problem. This is an order which not only recites that the Governor in Council regards the making of it as necessary for authorized purposes, but which in terms invokes the powers conferred on him by the Act of 1945. An order so expressed leaves no ground for a judicial inquiry whether the Governor can have intended to exercise those powers, a kind of inquiry which a court has sometimes found itself called on to make in a case where the instrument impugned is itself ambiguous: see, for instance, *In re Price Bros. & Co. and the Board of Commerce of Canada*.⁵¹ In the circumstances prevailing here their Lordships are satisfied that the true answer to any invitation to the court to investigate the Order in Council on its merits or to ascribe to it a purpose other than that which it professes to serve is given in the words of Duff C.J. in the *Reference re Chemical Regulations*: "I cannot agree that it is "competent to any court to canvass the considerations which "have, or may have, led him to deem such regulations necessary "or advisable for the transcendent objects set forth. . . . The "words are too plain for dispute: the measures authorized are "such as the Governor General in Council (not the courts) deems "necessary or advisable."⁵²

If, then, the expropriation which the Order in Council prescribes is to be held invalid in law it must be attacked by showing that the Act of 1945, truly interpreted, did not give the Governor the power to carry out what he has purported to

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⁴⁹ [1941] 2 K.B. 306, 316.⁵¹ 60 S.C.R. 265.⁵⁰ [1943] S.C.R. 1, 13.⁵² [1943] S.C.R. 1, 12.

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achieve. No other line of attack is open. Very wide general considerations have been brought to bear on this question of interpretation and have been held to limit the range of powers that the Act confers. For instance, the trial judge in Manitoba interpreted the Act as allowing only the continuance of existing powers and as authorizing nothing more to be done than what could be described as "the discontinuance of measures adopted " during and by reason of the emergency." So, too, the Chief Justice in the Court of Appeal: "In no portion of the Act was "there any power given to extend the controls." This imposes a construction that flies in the face of the words of the Act. It was not merely an Act to empower the Governor to continue measures already taken or to undo things already done. It was an Act that recognized that the emergency engendered by the war had brought about a situation in which new purposes might have to be served by new lines of executive action. There were the new problems of the post-war occupation of enemy territory, of the readjustment of men and of industry and commerce to peace-time needs, of securing economic stability in the fluctuating disorders of a post-war world, of restoring and distributing essential supplies in countries overseas that had been left in grave distress by the events of war. The Act itself recites explicitly "... whereas in the existing circumstances it may "be necessary that certain acts and things done and authorized "and certain orders and regulations made under the War "Measures Act be continued in force and that it is essential that "the Governor in Council be authorized to do and authorize such "further acts and things and make such further orders and "regulations as he may deem necessary or advisable by reason "of the emergency and for the purpose of the discontinuance, "in an orderly manner as the emergency permits, of measures "adopted during and by reason of the emergency." Plainly, within the scope of its wide range of purposes, the Act is conceived in the most fluid and general terms, conferring deliberately the most extensive discretion. To import into such a measure a precise limitation (if so vague a phrase can itself be said to be precise) that no action can be taken that "extends" a particular control of a particular commodity is, in their Lordships' view, a radical misunderstanding of the true nature of such legislation.

Nor can they give support to another general proposition about the Act of 1945 that has found favour with some of the members of the Supreme Court. This Act, it is said, amounts to a curtailment of the powers that the Governor in Council could exercise

during the war under the War Measures Act. It involves an immediate "reduction" of those powers. From this it is argued that, since the War Measures Act, in providing specifically for expropriation, provided also a procedure for judicial assessment of compensation, it is not to be supposed that its successor, which makes no reference either to expropriation or to compensation, has conveyed what would be the more extensive power of effecting an expropriation without compensation. Their Lordships think that a fallacy is involved in submitting the Act of 1945 to a measuring rod of this kind. Whether compensation is really a necessary condition of expropriation if made under the War Measures Act must be regarded as itself an open point: it is at least certain that section 7 does not expressly make it so, for it does no more than enact the procedure to be followed when "property . . . has been appropriated . . . and compensation is "to be made therefor." But, that apart, comparisons between the War Measures Act and the Act of 1945 are bound to go astray unless, in making them, a clear distinction is observed between "purposes" and "powers." The purposes for which powers may be exercised under the later Act are undoubtedly different from the purposes that are to be pursued under the earlier Act. In that, they are nothing less than "the security, "defence, peace, order and welfare of Canada"; in this, they are the various sets of purposes enumerated in heads (a) to (e) of section 2 (1). In that, the Governor may act in pursuit of those purposes "by reason of the existence of real or apprehended "war, invasion, or insurrection"; in this, his action is to be "by reason of the continued existence of the national emergency "arising out of the war against Germany and Japan." If it led to any relevant conclusion it might well be said that the purposes to be served under the War Measures Act are "wider" than those to be served under the Act of 1945. It would still be true that the latter are vast and sweeping and relate to an emergency that threatens the national life. But the question is not which is the wider set of purposes but whether a kind of action that is expressly permitted in pursuit of "war" purposes is impliedly excluded when the post-war purposes are to be attained. No real light is thrown on this by contrasting the respective widths of the two ranges of purpose, when each is inherently so wide. All that can be noted is that the things that may be done in pursuit of the permitted purpose are covered by the same words in each Act: the Governor in Council "may do and authorize

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“ such acts and things, and make from time to time such orders
“ and regulations as he may . . . deem necessary or advisable.”
They are words that give him the amplest possible discretion in
the choice of method.

This distinction between purposes and powers in the analysis
of the two Acts prevents their Lordships from drawing any useful
deduction from the fact that the later Act does not reproduce the
declaration to be found in the earlier Act that the powers of the
Governor are to extend to certain classes of subjects, of which
class (f) is “ Appropriation, control, forfeiture and disposition of
“ property and of the use thereof.” The fact that the later Act
did not include any such specific reference to the subject of
appropriation may be said to have formed the determining
element in the majority opinion of the Supreme Court.
Taschereau J. speaks of the power to appropriate property as
having been “ deleted ” from the Act of 1945 and deduces that
it was the clear intention of Parliament that such powers were
not to exist in the future. The Chief Justice, Rand and Cart-
wright JJ. make what is in effect the same deduction. But
their Lordships think it clear that there is too much difference
between the structures of the two Acts for any valid deduction
of this sort to be made. Purposes can be compared with
purposes; but these sub-heads (a) to (f) of section 3 of the War
Measures Act are not purposes, and it is misleading to contrast
their contents with the contents of sub-heads (a) to (e) of sec-
tion 2 (1) of the Act of 1945 and then to conclude that, because
expropriation is not included among the purposes listed in those
sub-heads (a) to (e), it is not a power covered by the Governor’s
authority to do whatever he deems necessary or advisable for
those purposes. Sub-head (c) does indeed include among the
subjects that may be maintained, controlled or regulated “ use
“ and occupation of property, rentals ”; but no one would suggest
that the ownership of property in general has been made a subject
for control or regulation. What is suggested is that the main-
tenance, control and regulation of these subjects that are
mentioned in this sub-head may very well involve or necessitate
the act of acquiring or changing the ownership of some piece of
property. To take a single instance among many that might be
offered: if supplies may have to be maintained, controlled or
regulated, is it reasonable to suppose that the power to acquire
any property compulsorily is impliedly withheld? So to hold
would threaten the very basis of the Act. Their Lordships think
that there is not by now any room for doubt as to the function

performed by the list of permitted subjects in section 3 of the War Measures Act. The form adopted is plainly borrowed from section 91 of the British North America Act, 1867. They do not extend the purposes already defined, for they are directed to explaining what can be done, not the object for which things may be done: they do not extend any more than they limit its powers, for all that they permit is already permitted by the general words that precede them (see *Re Gray*⁵³; *Ref. as to Validity of Orders in Council re Persons of Japanese Race*⁵⁴). What they do is to state explicitly certain things that are to be treated as falling within the range of the general powers already conferred. In that sense alone they extend, because they amplify, those powers. But the Act of 1945 makes no such declaration and offers no such list. It leaves the general powers that it confers unexplained by statutory definition. It is not as if it made some new declaration and offered some new list, the form of which might appropriately be compared with the form adopted by its predecessor. In such a case changes might indeed be significant. But where, as here, one term of the comparison is lacking altogether there is no firm ground for the inferences that have been drawn as to the intention of the later Act.

In their Lordships' view there is no better way of approaching the interpretation of this Act than to endeavour to appreciate the general object that it serves and to give its words their natural meaning in the light of that object. There are many so-called rules of construction that courts of law have resorted to in their interpretation of statutes, but the paramount rule remains that every statute is to be expounded according to its manifest or expressed intention. If the Act of 1945 is approached in this way, it is very difficult to see what warrant there is for introducing into it by way of interpretation an implied exclusion of any power in any circumstances to acquire compulsorily any piece of property. For, unless compulsory acquisition is absolutely excluded from the range of things that the Governor may do, any particular exercise of the power is a matter for his discretion and cannot come within the control of the court.

Yet this is an enactment framed for the purpose of meeting an emergency that imperils the national life: it authorizes action over the whole economic field and extends to purposes outside the territory of Canada itself; it embraces purposes such as the

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⁵³ 57 S.C.R. 150.⁵⁴ [1946] S.C.R. 248, 269; [1947] A.C. 87, 165.

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maintenance, control and regulation of supplies, prices, transportation, the use and occupation of property, rentals, employment, salaries and wages, which have no meaning if they do not involve a deliberate and consistent interference with private rights, including private rights of property. And the power of the Executive to pursue these purposes, while the national emergency continues, is conferred by Parliament without express reservation and in the amplest terms that statutory language can employ. There is nothing in the purposes themselves that makes it unlikely or unreasonable that expropriation would ever have to be resorted to. It might be said more truly that some of the purposes are such that expropriation would be a likely incident of their realization. Yet, if the argument for the respondent Nolan is right, it is the duty of the court to introduce into the Act a saving that absolutely excludes this particular form of action. Their Lordships have found it impossible so to interpret the Act.

It is fair to say that there is a well-known general principle that statutes which encroach upon the rights of the subject, whether as regards person or property, are subject to a "strict" construction. Most statutes can be shown to achieve such an encroachment in some form or another, and the general principle means no more than that, where the import of some enactment is inconclusive or ambiguous, the court may properly lean in favour of an interpretation that leaves private rights undisturbed. But in a case such as the present the weight of that principle is too slight to counterbalance the considerations that have already been noticed. For here the words that invest the Governor with power are neither vague nor ambiguous: Parliament has chosen to say explicitly that he shall do whatever things he may deem necessary or advisable. That does not allow him to do whatever he may feel inclined, for what he does must be capable of being related to one of the prescribed purposes, and the court is entitled to read the Act in this way. But then, expropriation is altogether capable of being so related. Nor can a court pause in doubt over the question whether this is an Act by which it is intended to authorize interference with private rights: such subjects as supplies, prices, rentals and wages cannot be controlled without interference on the largest scale. If rights so historic as a man's right to sell his labour where and at what price he pleases or a man's right to use his own property in his own way are avowedly placed under the Governor in Council as subjects of control and regulation, what peculiar sanctity can the law give to the ownership

of consumable goods, so that this particular form of private right is to be exempt from any action in pursuit of the authorized purposes? Certainly there is no rule of construction that general words are incapable of interfering with private rights and that such rights can only be trenched upon where express power is given to do so. The general words of the Defence of the Realm (Consolidation) Act, 1914, of the United Kingdom were adequate to authorize the internment, without trial, of Mr. Zadig (*Rex v. Halliday*⁵⁵). The general words of the War Measures Act were adequate to authorize the conscription of Mr. Gray for military service (*In re Gray*⁵⁶); or to authorize the deportation of British subjects and deprivation of their citizenship, without trial (*In re Japanese Reference*⁵⁷). On the other hand, in *Attorney-General v. Wilts United Dairies Ltd.*⁵⁸ the House of Lords refused to hold that the Food Controller, acting under the emergency legislation of the 1914-1918 war, had authority to impose as a condition of the taking of licences a charge which amounted to the levying of a tax. It is not clear from the abbreviated report that is available whether it would have taken the same view had there existed a defence regulation made under the Defence of the Realm Act expressly authorizing the imposition of such a charge. What is clear is that the decisions both of the Court of Appeal and of the House of Lords in that case were much influenced by their knowledge of the history of the Parliamentary struggle to prevent the levying or distribution of taxes without the express sanction of Parliament, and they were disposed to interpret the Food Controller's powers in the light of that history. But having regard to the other cases just referred to it would be impossible to extract from the decision in the *Wilts United Dairies* case⁵⁸ any general principle of construction that made general words in a statute incapable of authorizing the gravest possible inroads upon private rights. And, unless there is such a principle, their Lordships can find no sufficient ground for importing into the Act now under consideration an exception of the power to acquire compulsorily the absolute title to property.

For these reasons their Lordships will humbly advise Her Majesty that these appeals should be allowed and that the orders of the Supreme Court, the Court of Appeal of Manitoba and the Court of King's Bench of Manitoba in both actions should be set aside, except so far as they respectively deal with the costs

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⁵⁵ [1917] A.C. 260.⁵⁶ 57 S.C.R. 150.⁵⁷ [1947] A.C. 87.⁵⁸ 37 T.L.R. 884.

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of those actions and of the appeals therein; in lieu of the orders so set aside there should be judgment dismissing the action commenced by the respondent Nolan, and in the action commenced by the Board judgment should be entered for it against that respondent in the amount of the moneys remaining in court; the actions should be remitted to the Court of Appeal and the Court of Queen's Bench of Manitoba for an order for the payment out to the Wheat Board of the moneys remaining in court to the joint credit of the actions. Their Lordships' humble advice to Her Majesty that the orders as to the costs of the proceedings in Canada should be left undisturbed is in accordance with the terms on which the appellants were placed when they obtained special leave to appeal. In further pursuance of those terms the appellants will pay the costs of the respondent Nolan of this appeal.

Solicitors: *Charles Russell & Co.; Lawrence Jones & Co.*

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FIRESTONE TIRE AND RUBBER CO. (S.S.)

LD. APPELLANTS;

AND

SINGAPORE HARBOUR BOARD . . . RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR THE COLONY
OF SINGAPORE, ISLAND OF SINGAPORE.

Public authorities protection — Singapore Harbour Board — Short delivery from godown—Board authorized to carry on business of warehousemen—Acting for benefit of public within statutory powers —Protection—Public Authorities Protection Ordinance (c. 14 of 1936 ed. of Straits Settlements Ordinances, as amended by Ordinance No. 19 of 1939), s. 2 (1), (2)—Singapore Ports Ordinance (c. 149 of 1936 Ordinances), s. 73 (c).

Section 2 of the Public Authorities Protection Ordinance of the Straits Settlements (which is substantially in the same terms as section 1 of the English Public Authorities Protection Act, 1893) provides that: “(1) Where any action . . . is commenced against “any person for any act done in pursuance . . . of any public

* *Present:* LORD NORMAND, LORD TUCKER, LORD ASQUITH OF BISHOPSTONE and LORD COHEN.

"duty or authority, or in respect of any alleged neglect or default
 "in the execution of any such . . . duty or authority . . . (2) The
 "action . . . shall not lie . . . unless it is commenced within six
 "months next after the act, neglect or default complained of, . . ."

The Singapore Ports Ordinance, which created the Singapore Harbour Board, provided in section 73 that "The Board may . . . (c) carry on the business of . . . wharfingers and warehousemen . . ."

A cargo of rubber tyres consigned to the appellants in Singapore was discharged from the ship there by the respondents, the Singapore Harbour Board, on dates in July, 1946, and received by the respondent board in one of their godowns. There was short delivery on those dates to the appellants out of the godown to the extent of 17 tyres, and in proceedings begun by the appellants in June, 1948, claiming damages for the loss of those tyres the board failed to discharge the onus on them as bailees to prove that the goods were lost without negligence on their part:—

Held, however, that in the light of the provisions of the Ports Ordinance and on the facts, the board, in taking the appellants' goods into their care and custody in their godown were, in the words of Viscount Maugham in *Griffiths v. Smith* [1941] A.C. 170, at p. 185, in substance acting "in the course of exercising for the "benefit of the public an authority or a power conferred on" them by the Ports Ordinance, not being a mere subsidiary power. The board, who were admittedly a public authority, in operating the warehouses, did not thereby cease to function as a harbour board and undertake some purely subsidiary activity of a non-public nature. They were supplying facilities essential to the shipping and commercial community of Singapore in one of the ways authorized by the Ports Ordinance and were thus fulfilling one of the main purposes for which they had been given statutory powers, and, the action not having been commenced within the statutory period, were accordingly entitled to the protection of the Public Authorities Protection Ordinance.

Bradford Corporation v. Myers [1916] 1 A.C. 242, and *Griffiths v. Smith* [1941] A.C. 170 considered.

Judgment of the Court of Appeal of Singapore affirmed.

APPEAL (No. 8 of 1951) from a judgment of the Court of Appeal for the Colony of Singapore (March 28, 1950), reversing a judgment of Brown J. (December 9, 1949).

In June, 1946, a cargo of 3,960 rubber tyres and 33 cases of rubber tubes was consigned to the appellants, the Firestone Tire and Rubber Company (S.S.) Ltd., in Singapore from Bombay. On dates in July, 1946, the cargo was discharged from the ship in Singapore by servants of the respondents, the Singapore Harbour Board, and was received by the board in one of their godowns. On the same dates in July the cargo was delivered out of the godown to the appellants with the exception of 17 tyres. The appellants brought the action out of which this appeal

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arose against the respondent board claiming damages for the loss of the 17 tyres. The writ in their action was issued on June 19, 1948.

By section 2 of the Public Authorities Protection Ordinance of the Straits Settlements: "2.—(1) Where any action, prosecution or other proceeding is commenced against any person for "any act done in pursuance or execution, or intended execution "of any ordinance or rules made thereunder, or of any public "duty or authority, or in respect of any alleged neglect or "default in the execution of any such ordinance, rules, duty, or "authority the following subsections shall have effect.

"(2) The action, prosecution or proceeding shall not lie or be "instituted unless . . . (b) it is commenced within six months "next after the act, neglect or default complained of, or in case "of a continuance of injury or damage, within six months next "after the ceasing thereof."

The Singapore Ports Ordinance, by which the respondent board was created, provided in section 73 that "The Board may " . . . (c) carry on the business of . . . wharfingers and ware- "housemen. . . ."

The respondent board pleaded, *inter alia*, that the action not having been commenced within six months after the alleged act, neglect or default complained of, was barred by the Public Authorities Protection Ordinance.

Before the trial judge (Brown J.) the respondent board failed to discharge the onus of proving that the tyres were lost without negligence on their part, and the judge rejected the plea under the ordinance. He gave judgment for the appellants for \$2,053.10.

The Court of Appeal for Singapore (Murray Aynsley C.J.S. and Gordon Smith J., Evans J. dissenting), reversing the judgment of the trial judge, held that the action was barred by section 2 (2) of the Public Authorities Protection Ordinance.

1952. April 29, 30; May 1, 5. *Raeburn Q.C.* and *R. Withers Payne* for the appellants. Except as to the defence under the Public Authorities Protection Ordinance, the judge of first instance and the Court of Appeal were unanimously in favour of the appellants. The point on which the appellants appeal is whether in relation to this transaction the respondent board are or are not protected by the ordinance. It is contended that they are not. The ratio decidendi of the majority in the Court of Appeal would appear to be that on the true construction of the

Singapore Ports Ordinance the respondents were exercising their functions in this matter as a public authority, and that once they had undertaken to act as warehousemen everything which they did pursuant to that undertaking was done pursuant to what the ordinance had made their public duty. Evans J., the dissenting judge, said that the function of the board, on the true construction of the Ports Ordinance, was to develop the lands vested in it, and its other functions were permissive only, and that on the analogy of *Bradford Corporation v. Myers*,¹ whether it broke a contract entered into pursuant to one of its permissive functions which amounted to the carrying on of a trade or business, or whether it committed a tort in the course of carrying out such permissive functions, it was not within the protection of the Public Authorities Protection Ordinance. Section 73 of the Ports Ordinance rather lumps together things which the board were bound to do and things which they might do, and it is really a question of construction in each case which of those things they were bound to do and which they might do.

It is submitted, (i) that the respondent board agreed on taking delivery of the goods—that is to say, by their act in taking the goods over the ship's side—to hold them as bailees for the party which in the event had presented a delivery order. That agreement was, of course, with the shipowners. (ii) The board in so contracting were acting within the permissive provisions of section 73 (c). (iii) The duty of the board to consignees—the appellants here—as holders of the delivery order goes incidentally to the contract between the shipowners and the board, and it arose out of the presentation by the consignees of the delivery order. (iv) Such was the relationship between the appellants and the board that even if there had been a *prima facie* public duty, in this particular case the board were acting under a contract which they need not have entered into—it was no part of their public duty to enter into contracts with the shipping company. Further, if it was their public duty to enter into a contract with the shipping company, it was no part of their duty to enter into a further contract with the appellants. But it is not, of course, admitted that it was their public duty to enter into a contract with the shipping company.

There are two main authorities, one on each side of the line, on the question whether a public authority is so acting as to be entitled to the statutory protection. The first is the *Bradford*

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¹ [1916] 1 A.C. 242.

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Corporation case,¹ where the corporation were held not to be protected. The test is not that the respondent board have a contract, but that they are doing this act in the course of carrying on a trade or business which they are not bound to carry on. In each particular case what has to be looked at is what the authority were doing at the material time. Sometimes one test is helpful, sometimes another, and sometimes the tests overlap. There is no principle of universal application, but there are certain lines of distinction which can be used as a test. If there is an obligation which is not of a public nature there would not be protection. If the authority functions as a public servant it is doing the act in pursuance of its public duty; the same authority may, however, function as a trader, and the public authority has to satisfy the court before whom it claims protection that it is being addressed in its capacity as a public authority and not in its capacity as a trader. If what was being done at the time was governed by a private contract, that is very helpful in determining in what capacity it acted. *Griffiths v. Smith*²—the case on the other side of the line—is more confusing than the *Bradford Corporation* case.³

It is submitted that the Chief Justice in Singapore apparently took the view that the *Bradford Corporation* case³ had been to some extent qualified and explained in *Griffiths'* case.⁴ The two cases are clearly distinguishable. There is all the difference between a public authority which has various functions, such as the *Bradford Corporation* and the *Singapore Harbour Board*, and a public authority like school managers, who have one function, as in *Griffiths'* case.⁴ The important element which must be emphasized here in section 73 (c) of the Ports Ordinance is "carrying on the business." It is perfectly consistent with the provisions of the ordinance that there should yet be warehouses although the harbour board might decide that it is not going to carry on any business of warehousemen. There are cases on each side of the line, and it is here just a question of on which side of the indeterminate line this kind of case falls. This sort of activity, trading by the harbour board, is much nearer to the kind of trading by the *Bradford Corporation* than the sort of position that arose with the school managers in *Griffiths'* case.⁴ In *Palmer v. Grand Junction Railway Co.*,⁵ the company had power

¹ [1916] 1 A.C. 242.

² [1941] A.C. 170.

³ [1916] 1 A.C. 242.

⁴ [1941] A.C. 170.

⁵ (1839) 4 M. & W. 749, 753.

to levy rates precisely in respect of their being common carriers; so that the fact that the harbour board here had that power does not involve that they were prevented from carrying on business other than a public duty. The following passage from the Law Quarterly Review, vol. 57 (1941), p. 156 (notes), is adopted as part of this argument: "Thus the fact that a public authority " had been given the power to do an act did not, by itself, give it " the benefit of the statute. . . . The duty must be one which " was," in the words of Lord Buckmaster L.C. in the *Bradford Corporation* case,⁶ " ' owed to all the public alike or an authority " ' exercised impartially with regard to all the public.' " I still draw a distinction between carrying on a business and providing public facilities for which a charge can be made.

And in the Law Quarterly Review, vol. 39 (1923), at p. 353, referring to the proposition that " an ' act ' in pursuance, etc., of " a public duty must be done directly (and not merely incidentally) in pursuance, etc., of that duty," it was said that " directness " is necessarily a matter of " degree "; and at p. 355 that " it is enough if it is done in exercise of a power or of an " authority, provided it is to be exercised for the public benefit." And considerable importance is attached to the next passage, on p. 356: " The terms of section 1 of the Act have been considered " in the light of their interpretation in the courts. It seems that " the present effect of the first part of the section is somewhat as " follows: ' Where any action [etc.] is commenced against any " ' person . . . in respect of alleged neglect or default in the direct " ' execution of any positive duty or authority, imposed or conferred on him and to be exercised for the benefit of the public " ' alone, the following provisions shall have effect. . . . ' " The distinction which the writer suggests is, it is submitted, right; the article is very carefully built up on the authorities and there appears to be no flaw in the reasoning.

*Western India Match Co. Ltd. v. Lock*⁷ is not in point; it is cited because it was relied on below. The whole of that case turned on the peculiar position in war time of the Minister's powers and authority to act for the benefit of the public and to exercise powers under regulations. In the present case the act was incidental to the main functions of the respondent board in the way in which the activities of the school managers in *Griffiths'* case⁸ were not. In *Stewart's Executrix v. Clyde*

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⁶ [1916] 1 A.C. 242.⁸ [1941] A.C. 170.⁷ [1946] K.B. 601, 605.

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Navigation Trustees,⁹ Lord Sorn, after saying that he thought that at this time of day the provisions of section 1 of the Public Authorities Protection Act, 1893, were very much out of date, distinguished that case from the *Bradford Corporation* case.¹⁰ *The Ydun*¹¹ does not carry the matter much farther, and is clearly distinguishable on the facts. It is submitted that so far as the judgment of the Chief Justice below rests on authority earlier than, and inconsistent with, the *Bradford Corporation* case,¹² it is founded ex hypothesi on insecure foundations; and so far as that judgment sought to belittle the authority of the *Bradford Corporation* case¹² it is misconceived. And so far as later authority, and particularly *Griffiths*' case,¹³ is relied on as having superseded the *Bradford Corporation* case,¹⁴ it is submitted that it has not superseded it at all, but supplements it. *Hawkes v. Torquay Corporation*¹⁵ and *Clarke v. Bethnal Green Borough Council*¹⁶ are consistent with one another; the distinction between them is clear. Lastly, the proposition to be derived from *Turburville v. West Ham Corporation*¹⁷ is that the public authority must exercise its statutory powers and employ, say, teachers, under contracts, and matters arising out of that are covered by the Act, but when, acting under further powers, it in effect varies those very contracts, it is then acting in another capacity. That is a little analogous to the present case, for here, when berthing a ship, the respondent board is acting under its statutory powers, and as a public authority, but when it is exercising its functions in carrying on the business of warehousemen it is not acting under its public duty at all, but is in fact acting as a private business organization.

In the *Bradford Corporation* case,¹⁸ as in this case, what the authority were doing was trading in competition with other people. There is no justification for the Chief Justice's view that "the appellants are a public authority incorporated to carry on "a trade." They are incorporated to manage a port, though there are trades associated with that; but the business of warehousemen is not included—it is not under the umbrella. The line is an indistinct one, but, as Viscount Haldane said in the *Bradford Corporation* case,¹⁹ one can tell a heap when one sees it.

⁹ 1946 S.C. 317, 323.

¹⁰ [1916] 1 A.C. 242.

¹¹ [1899] P. 236.

¹² [1916] 1 A.C. 242.

¹³ [1941] A.C. 170.

¹⁴ [1916] 1 A.C. 242.

¹⁵ [1938] 4 All E.R. 16.

¹⁶ (1939) 55 T.L.R. 519.

¹⁷ [1950] 2 K.B. 208, 226.

¹⁸ [1916] 1 A.C. 242.

¹⁹ Ibid. 251.

The distinction is between public duties which are statutory and public duties which are not statutory. The *Bradford Corporation* case ²⁰ is my sheet anchor.

Diplock Q.C. and *J. F. Donaldson* for the respondent board, were required to confine their argument to the Public Authorities Protection Ordinance. The way to approach the question whether this action is barred by the Public Authorities Protection Ordinance is, first, to find out what the harbour board were doing; secondly, pursuant to what duty or authority were they doing it; and thirdly, was it done in pursuance or execution of any public duty or authority? It must be seen in what capacity the board were dealing with these goods. The procedure followed in relation to the unloading and delivery of the goods was in accordance with the normal procedure of the port. In case of delivery to the board, the board's stevedores take over at the slings. The goods were taken from the ship's side to the godowns. Undoubtedly the board became bailees. It was part of the process of unloading goods. That, then, is what the board were doing, and the next question is, pursuant to what duty or authority were they doing it? That involves looking at the relevant provisions of the Ports Ordinance, the most important of which is the heading itself: "To constitute Boards for the "management and control of the Ports of Singapore and "Penang"; see also sections 2 and 4 (4). It is the duty, even if an imperfect obligation, of the board to manage and control the port efficiently, and in the course of it, to do all those things which are normally associated with that management and control. Where there is a body with limited funds—because the board raises its funds from rates—it is normally found that the powers are cast in permissive form. There is no positive duty on such a board to carry out any works at all.

Turning to the relevant sections of the Ports Ordinance, section 29 (3) limits the board's powers of leasing to three years unless the written sanction of the Governor is obtained: that is a matter of which the court is entitled to take judicial notice. Section 46 places on the board an obligation to frame a scale of rates for a number of matters, including "(a) The landing . . . "storage . . . of goods." Section 46 contains no power in the board to enter into any special agreement for those matters; that is to be contrasted with section 47 (2) where agreement may be

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entered into. The board is not entitled to make a profit in the ordinary sense out of its activities. Section 60 (1) does perhaps throw some light on the matter—it has always been the duty of the board efficiently to administer the property. Section 62 provides for the recovery of rates; it is something quite different from a separate contract or individual agreement. Section 73, headed “Works and Duties,” states the nature of the duties and work which the ordinance required for the administration of the port. Section 74 (2) and (3) do contain in some respects a compulsory power. Section 75 is the one section of the ordinance which is couched in the words of an obligation—the board “shall,” etc. With regard to section 76 (c), all those matters are put in the same category, obviously treating the use of those premises for the categories as being an essential part of the business: the fact that the board has power to make by-laws is not necessarily decisive, but it is an indication. There being that power to make by-laws, which require the sanction of the Governor, it is a strong indication that the matters dealt with by the by-laws are wholly within the expression “public duties.” Section 78 imposes penalties for infringement of by-laws. It is submitted, therefore, that the transaction in question is far from a private contract entered into between a public authority and private individuals; the whole relationship between the parties is regulated by the ordinance.

The third question is, was what the board were doing an act in pursuance of a public duty or authority? The question is, does the act come within the literal meaning of the section? and if it does, as plainly it does in this case, one must see whether there is something about what they did which takes it outside the purview of the ordinance. The onus is on those who say that a public authority which is doing an act within the powers conferred on it is not entitled to the protection of the ordinance. A test which has sometimes been suggested is what may be called the “contract or no contract” test; that is to say, the test that the act was being done pursuant to a contractual obligation, then the protection of the ordinance is excluded. It is not necessary to do more than remind the board of the *Bradford Corporation* case,²⁰ *Western India Match Co. Ltd. v. Lock*²¹ and *Lyles v. Southend-on-Sea Corporation*.²² The present case was fought in Singapore on the basis that contract was the test. The appellants

²⁰ [1916] 1 A.C. 242.

²¹ [1946] K.B. 601.

²² [1905] 2 K.B. 1.

took the view that unless they could establish contract they must necessarily fail. The existence of a contract may be a relevant factor in applying the true test, but it is not conclusive and is not itself a test. Another test suggested, and one which, it is submitted, is the correct test, though it may not be easy to apply, is, was the authority carrying out the objects for which it was clothed with statutory powers? Here, it clearly was, and accordingly was within the protection of the ordinance.

Raeburn Q.C. in reply. It was submitted for the respondent board that the object of the board's incorporation was the management and control of the port; that this court can take judicial notice of the port of Singapore; and from that merged the point that such a port must have warehouses, and therefore, it was said, the business of warehousemen was a necessary activity of such a port. The objects set out in section 73 (c) of the Ports Ordinance, however, are on the face of them collateral to or incidental to the main object, which is the management of the port. The business of wharfingers and warehousemen carried on by the board is not confined to those shipping companies using the port; there is nothing to stop the board from warehousing goods for local merchants, subject to the necessity of making fixed charges. The board can please itself whether it accepts warehousing business or not, and that is going a long way from "public duty or authority."

June 10. The judgment of their Lordships was delivered by LORD TUCKER. On December 9, 1949, Brown J., sitting in the High Court of the Colony of Singapore, gave judgment for \$2,053.10 in favour of the appellants, who were the plaintiffs in an action brought by them against the respondent board claiming damages for the loss of 17 tyres, the property of the appellants, which had been received by the board in one of their godowns in the harbour of Singapore but never delivered to the appellants. On appeal by the respondent board to the Court of Appeal for the Colony the judgment of the trial judge was (by a majority) reversed and judgment entered for the respondent board on the ground that the action was barred by section 2 (2) of the Public Authorities Protection Ordinance of the Straits Settlements, not having been commenced within six months next after the act, neglect or default complained of. This plea had been rejected by the trial judge. The appellants appealed to Her Majesty in Council by leave of the Court of Appeal. It was common ground that if the Court of Appeal decision with regard to the Public

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Authorities Protection Ordinance was correct the appeal must fail, but counsel for the respondent board was desirous of arguing, should it become necessary so to do, that the board were in certain events entitled to succeed on other grounds. The only issue, however, debated before their Lordships was the applicability of the ordinance.

The parties are hereinafter referred to as "the appellants" and "the board." The material facts, which are not now in dispute, are as follows: (1) On or about June 25, 1946, the Firestone Tire Co. of India Ltd. (hereinafter referred to as "the consignors") consigned a cargo of 3,960 rubber tyres and 33 cases of rubber tubes to the appellants in Singapore from Bombay per s.s. *Samokla* on the terms of a bill of lading dated in Bombay June 18, 1946, between the consignors and the P. and O. Steam Navigation Co. A copy of the bill of lading was sent on June 25, 1946, to the appellants by the consignors. By the bill of lading the goods were shipped to consignors' order, with an option to the shipping company (the P. and O.) to deliver "either over the ship's side or from lighter or store ship or hulk or Custom House or warehouse or dock or wharf or quay at consignees' risk." It also provided that the bill should be surrendered duly indorsed at port of destination in exchange for delivery order. (2) On or about June 28, 1946, Islay Kerr & Co. Ltd. of Singapore, as agents for the shipping company (P. and O.) supplied to the appellants a delivery order dated June 28, 1946, addressed to the board requesting them to deliver the cargo to the appellants. (3) On or about July 4, 1946, the delivery order was sent by the appellants to the board. (4) On July 4, 1946, the s.s. *Samokla* arrived in Singapore and berthed at godowns Nos. 1 and 2. (5) On July 11, 12, 13 and 14, 1946, the cargo was discharged from the s.s. *Samokla* by the servants of the board and was received by the board in one of their godowns. (6) On or about the dates aforesaid the cargo was delivered out of the board's godown to the appellants or to their order with the exception of the 17 tyres in respect of which the action was brought, which were never delivered. Loss of the goods was reported to the board's clerk on duty at the godown at the time, and formal notification in writing given on August 1, 1946. (7) The writ in the present action was issued on June 19, 1948.

These being the facts, the board failed to discharge the onus which lay on them as bailees to prove that the goods were lost without negligence on their part, and apart from the Public Authorities Protection Ordinance were accordingly liable to the

appellants unless they could rely on some contractual protection, and it was on this aspect of the case that counsel for the board desired to reserve his right of further argument. For present purposes it is assumed that but for the ordinance the appellants would be entitled to hold the judgment of the trial judge in their favour.

The material provisions of section 2 of the Public Authorities Protection Ordinance are as follows: "2.—(1) Where any action, "prosecution or other proceeding is commenced against any "person for any act done in pursuance or execution, or intended "execution of any Ordinance or rules made thereunder, or of any "public duty or authority, or in respect of any alleged neglect or "default in the execution of any such Ordinance, rules, duty or "authority the following subsections shall have effect. (2) The "action, prosecution or proceeding shall not lie or be instituted "unless . . . (b) it is commenced within six months next after "the act, neglect or default complained of, or in case of a con- "tinuance of injury or damage, within six months next after the "ceasing thereof." This language is for all practical purposes identical with the English Public Authorities Protection Act of 1893. Although the words "public authority" do not appear in the section, it has long been settled law that the words "any per- "son" must be limited so as to apply only to public authorities or persons acting on behalf of public authorities.

In the present case it has been admitted throughout that the board is a "public authority" within the meaning of the ordinance so interpreted. The sole issue, accordingly, is whether in taking the appellants' goods into their custody for delivery to them they were doing an act "in pursuance of any public duty "or authority." In this connexion it is also well settled that this question cannot be resolved merely by ascertaining whether the act or activity in question was *intra vires* the authority. The protection of the ordinance does not cover all the lawful and authorized acts of a public authority. Some acts are excluded. The difficulty is to define what acts or classes of act are excluded. In *Bradford Corporation v. Myers*,²³ Lord Buckmaster L.C. said: "The difficulty is to draw a line between the class of cases that "are within and those that are without the statute, and I am "conscious that this opinion does not establish as clear and "distinct a line as I should like to see. But the statute itself is "so framed that such distinction is not easy, and there may well

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²³ [1916] 1 A.C. 242, 250.

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"be cases about which greater doubt may arise and more uncertainty be felt than about the present, which to my mind lies clearly outside the area of statutory protection." In the same case Viscount Haldane said ²⁴: "What causes of action fall within these categories it may be very difficult to say abstractly or exhaustively. It is hardly easier to define a priori the meaning of being done directly than it is to define the number of grains that will make a heap. But just as it is not difficult to tell a heap when it is seen, so it may be easy at least to say of certain acts that they are not the immediate and necessary outcome of duty or authority in a particular case."

Viscount Dunedin expressed his entire agreement with the speech of Lord Buckmaster, and neither Lord Atkinson nor Lord Shaw attempted to enunciate a principle for the construction of the statutory words, although Lord Shaw expressed his disapproval of the process of attempting to find an answer by first putting the question, "What is it that this statute did not mean?"

When the construction of these words again came before the House of Lords in 1941 in *Griffiths v. Smith*,²⁵ the noble Lords who took part in that case again emphasized the difficulty of giving any precise or exhaustive definition, and none of them attempted so to do, Lord Porter saying: "I doubt whether it ever will be possible to lay down some general principle by which all cases can be tested."²⁶

In this state of affairs it will not perhaps cause surprise if their Lordships do not attempt to accomplish what the noble Lords referred to above found well nigh impossible, but content themselves with examining the two cases cited with a view to extracting therefrom certain matters and considerations that are relevant to, though not necessarily always decisive of, this issue:—1. It is essential to the protection afforded by the statute that the act or default in question should be in the discharge of a *public* duty or the exercise of a *public* authority. This assumes that there are duties and authorities which are not public. (See *per* Lord Buckmaster in the *Bradford Corporation* case.²⁷) 2. In deciding whether the duty or authority has this public quality it is sometimes relevant to consider whether it arises out of or is imposed by a contract voluntarily entered into by the public authority with an individual with whom it is under no obligation to

²⁴ [1916] 1 A.C. 242, 251.

²⁵ [1941] A.C. 170.

²⁶ *Ibid.* 211.

²⁷ [1916] 1 A.C. 242, 247.

contract. 3. The mere fact, however, that in the discharge of its duty or the exercise of its authority the public authority may have made a contract does not of itself deprive the duty or authority of its public quality. The existence or absence of a contract is not a decisive test. (See *per* Lord Shaw in the *Bradford Corporation* case.) 4. Effect must be given to the word "authority." This excludes the test of obligatory, as opposed to permissive, powers. (See *per* Viscount Maugham in *Griffiths'* case.²⁸.)

Their Lordships consider that the following passage from *Griffiths'* case,²⁸ in the speech of Viscount Maugham (which speech was expressly approved by Viscount Simon), affords them most assistance in the determination of the present case: he there says²⁸: "It is sufficient to establish that the act was in substance done in the course of exercising for the benefit of the public an authority or a power conferred on the public authority not being a mere incidental power, such as a power to carry on a trade." The word "incidental" is here used in the sense of "subsidiary." It has in these cases sometimes been used as equivalent to "necessarily incidental to," and was so used by Lord Greene M.R. in *Griffiths'* case in the Court of Appeal. It will therefore avoid any possible confusion if "subsidiary" is substituted for "incidental" in the passage quoted above. Applying this test to the facts in *Griffiths'* case the noble Lords held that the finding of the trial judge that the school premises in question where the accident occurred was on the occasion in question being used as a public elementary school, and not for some extraneous purpose, was almost conclusive.

In the present case their Lordships accordingly proceed to consider the Ports Ordinance (c. 149), by which the respondent board was created, with a view to determining whether in the light of its provisions and on the facts set out above the board in taking the appellants' goods into their care and custody in one of their godowns within the precincts of the port of Singapore were in substance acting in the course of exercising for the benefit of the public an authority or power conferred on them by the Ports Ordinance, not being a mere subsidiary power.

The heading of the Ports Ordinance reads:—"To constitute Boards for the Management and Control of the Ports of Singapore and Penang." Section 2 provides for the transfer of obligations and the benefit of debts due. Section 4 (4) provides

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²⁸ [1941] A.C. 170, 185.

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that: "The duty of carrying out this ordinance within such limits
" in the ports and Settlements of Singapore and Penang respec-
" tively as are duly prescribed shall, subject to such conditions
" and limitations as are in this Ordinance hereinafter contained,
" be vested in bodies of commissioners to be called respectively
" 'The Singapore Harbour Board' and 'The Penang Harbour
Board.' "

Section 29 (3) limits the board's power of leasing to three years unless the written sanction of the Governor is obtained. Section 46 imposes an obligation on the board to frame a scale of rates for, inter alia, "the landing, shipping, wharfage, "crannage, storage or demurrage of goods at any wharf, dock, "pier, building or other place in the possession of the board," and gives power to the board to levy any such rates. It is to be observed that with regard to the matters specifically dealt with in this section the board are given no power to enter into special agreements instead of charging in accordance with the scale of rates framed by them. This is in contrast with section 47 (2), which confers such a power with regard to charges for the use of docks and the other matters there referred to.

Section 60 (1) enacts that provision shall be made for the due fulfilment of the board's liabilities "and for the efficient adminis-
"tration of the property vested in it under this ordinance." Section 62 provides for the recovery of leviable rates and gives a right to seize and detain goods until the rates due in respect thereof are paid. Section 73 is headed "Works and Duties." It enacts that "The board may" do the various things enumerated in paragraphs lettered (a) to (g). The section is clearly designed to give wide powers to the board so as to cover every activity which could be foreseen and avoid any question of some act being held to be ultra vires. It includes some matters, such as the construction, maintenance and repair of docks and wharves, which are of the very essence of the undertaking, and other matters, some of which might be considered purely subsidiary and others to be on the border line. The paragraph which is most relevant for present purposes is (c), which reads as follows: "Carry on the business of builders and repairers of ships and "machinery, of wharfingers and warehousemen, of dealers in "coal and other kinds of fuel, and dealers in stores connected "with or required in the above-named business."

Paragraph (p) permits them to "be insurers of goods in the "custody of the board." This, however, does not mean, as seems to have been thought by some, that it gives power to take

out a policy of insurance in respect of goods in their custody, but that they may take upon themselves the liability of insurers of such goods.

Sections 74 and 75 deal with the regulation of the use of wharves, and read as follows: "74. (1) The Governor may, notwithstanding anything in this ordinance, appoint any part of the wharves or premises vested in the board as a place for the collection of import or other revenue duties payable to the Government. (2) Whenever any wharf or part of the premises of the board has been so appointed as a place for the collection of import or other revenue duties, the board shall set apart and maintain such place, in such manner as the Governor requires, for the use of the persons entitled to collect such duties. (3) All rates payable in respect of any such wharf or part of the premises so set apart, or for the landing, shipping or storage of goods thereon, therefrom or therein, shall be paid to the board."

Section 75: "The board shall provide such number of public landing-places as are, in the opinion of the Governor, sufficient, from and at which the public shall be permitted to embark and land, free of charge, and may, with the sanction of the Governor, vary the same."

Section 75 is, apart from the section which imposes a duty to frame a scale of rates, the only section which is in express terms obligatory, but when read in conjunction with the previous section it is clear that the emphasis is on the duty to make available a sufficient number of free landing-places from the number of existing landing-places rather than to construct special landing-places for this purpose.

Section 76 gives the board power to make by-laws for, inter alia, (c) "the safe and convenient use of the docks, wharves, piers, landing-places, warehouses, sheds and premises vested in the board or under its control and of any ferry service maintained by the board," and (d) "regulating the reception, storage and removal of goods within and from the premises of the board. . . ." Section 78 imposes penalties for the infringement of by-laws.

The board, having constructed or become possessed of warehouses, which must be regarded as a normal and necessary adjunct to a port such as Singapore, could elect whether to let them out to others for periods less than three years (or with consent of the Governor for longer periods) or themselves to operate them as wharfingers and warehousemen and levy rates

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for the wharfage or storage of goods therein. Having chosen the latter alternative they did not thereby cease to function as a harbour board and undertake some purely subsidiary activity of a non-public nature. They were supplying facilities essential to the shipping community in one of the ways authorized by the ordinance by which they were created a harbour board charged with the management and control of the port, and were thus fulfilling one of the main purposes for which they had been given statutory powers.

Counsel for the appellants stressed the fact that in so doing they were, in the words of Viscount Maugham, "acting under a "power to carry on a trade," and he further argued that in so doing they entered into a contractual relationship both with the appellants and the shipping company, or alternatively, only with the shipping company, and that the existence of this contractual relationship which gave rise to the liability of the board arose out of a private trading transaction.

It would, however, be putting much too narrow a construction on Viscount Maugham's language to interpret it as meaning that every act done under a power to trade must always be a mere subsidiary power. He was doing no more than giving an instance of a subsidiary power, having in mind, no doubt, the facts in the *Bradford Corporation* case.²⁹ Furthermore, as previously stated, the existence or non-existence of a contract is not a decisive test, and on the facts of the present case their Lordships are clearly of opinion that the question of contract is immaterial to their decision since, on any view, the board were exercising their permissive powers to perform a normal function of a harbour board and in so doing were providing a service essential to the shipping and commercial community of Singapore and accordingly entitled to the protection of the Public Authorities Protection Ordinance.

In the result their Lordships feel no difficulty in deciding on which side of the line this case lies and are in agreement with the conclusion reached by the majority of the Court of Appeal. Evans J., in his dissenting judgment, held that there was no public duty on the board to run a warehousing business. He says the public had not been consulted and might have preferred to deal with private traders, and after quoting Viscount Maugham he finds that the board is carrying on a trade and there was no evidence that it was acting for the public benefit. From what

²⁹ [1916] 1 A.C. 242.

has been already stated it will be seen that this view does not give sufficient weight to the word "authority" as distinct from "duty," and would appear to lay more emphasis on the words "such as a power to carry on a trade" than was intended in the context in which they were used.

In agreeing, however, with the conclusion reached by the majority their Lordships think it right to observe that they are not able to accept the test laid down by the Chief Justice in that portion of his judgment where, in dealing with the interpretation of the decision in the *Bradford Corporation* case,²⁹ he says: "The corporation was obliged to supply gas and authorized to sell coke. This distinction was stressed in the judgments of the House and this stress caused the actual decision to be misunderstood. In view of later cases it must be taken to be limited to cases in which there is a contract and either a breach of contract or a tort arising out of the performance of that contract. When there is no contract there is no distinction between activities which are obligatory and those which are merely permissive."

For the reasons stated, their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellants must pay the respondents' costs of the appeal.

Solicitors: *Smith & Hudson, for Drew & Napier, Singapore; Parker, Garrett & Co.*

²⁹ [1916] 1 A.C. 242.

COMMISSIONER OF INCOME TAX, COLOMBO APPELLANT;
AND
SUTHERLAND (EXECUTRIX OF THE ESTATE
OF R. W. SUTHERLAND, DECED.) . . . RESPONDENT.

J. C.*

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ON APPEAL FROM THE SUPREME COURT OF CEYLON.

Ceylon—Revenue—Income tax—Contract—"Four year contract with six months' leave on full pay"—Construction—No leave taken—Death of employee—Leave pay not due to deceased's estate—Income Tax Ordinance (Legislative Enactments of Ceylon, 1938, c. 188), ss. 5 (1), 6 (2) (a) (i) (v).

* *Present*: LORD NORMAND, LORD TUCKER, LORD ASQUITH OF BISHOPSTONE and LORD COHEN.

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It was common ground that the contract of service, not in writing, of the respondent's husband with a company in Ceylon had been "a normal four-year contract with six months' leave on full pay." He served the company from December, 1939, until his death in June, 1946, without taking any leave, and after his death the company paid to the respondent Rs. 15,750 pursuant to a resolution of the directors that that sum "had been placed to reserve "to meet the contingent liability to pay the deceased's leave pay "which he would have been entitled to if he had survived," and "it was decided to . . . authorize a payment to the respondent of "Rs. 15,750. . . ." That sum having been assessed to income tax in the respondent's hands as executrix of her husband on the ground that it was a profit of his employment under the head of "leave pay" in section 6 (2) (a) (i) or under the head "allowance granted "in respect of employment" in section 6 (2) (a) (v) of the Income Tax Ordinance of Ceylon:—

Held, that there was no ambiguity in the description "a normal "four-year contract with six months' leave on full pay," which meant a contract for four years' service with six months' leave, which leave should be on full pay. That being so, there was no basis for a claim by the deceased's executrix for pay in lieu of leave on his death without having had leave. The contract therefore did not provide for any payment of leave pay except on a contingency which was never fulfilled, and there being no need or justification in the circumstances for implying a term by which the company would be bound to pay leave pay when no leave was taken, the respondent had discharged the onus which rested on her of showing that the payment of the Rs. 15,750 was not contractual and was not due to the deceased's estate on his death.

Judgment of the Supreme Court of Ceylon (1951) 52 C.N.L.R. 553, affirmed.

APPEAL (No. 41 of 1951) from a judgment of the Supreme Court of Ceylon (April 27, 1951).

The following facts and statutory provisions are taken from the judgment of the Judicial Committee: This was an appeal from a judgment of the Supreme Court of Ceylon on a case stated by the Board of Review for income tax under section 74 of the Income Tax Ordinance, Ceylon (c. 188). The case was stated on the application of the respondent in order to bring under review a decision of the board, affirming a decision of the Deputy Commissioner of Income Tax, that a sum of Rs. 15,750 was assessable to income tax in the respondent's hands as executrix of her late husband. The assessment was made on the footing that that sum was a profit of the deceased's employment under the head "leave pay" in section 6 (2) (a) (i) or under the head "allowance granted in respect of employment" in section 6 (2) (a) (v) of

the Income Tax Ordinance (c. 188) as amended by section 3 of the Income Tax (Amendment) Ordinance, No. 25 of 1939.

The facts had to be gathered from the case stated and the documents incorporated with it and annexed to it. The respondent's husband, the late R. W. Sutherland, entered the employment of the Colombo Apothecaries Co. Ltd. (hereinafter referred to as the company) as its managing director in November or December, 1939, and continued in that employment till his death on June 12, 1946. He had not taken any leave during that period. After his death the company paid to Mrs. Sutherland the sum of Rs. 15,750. The payment was made under the authority of a resolution passed by the directors of the company on July 17, 1946, in these terms: "The directors having taken note that a sum of Rs. 15,750 had been placed to reserve to meet the contingent liability to pay for Mr. Sutherland's leave pay which he would have been entitled to if he had survived, it was decided to pay Mrs. Sutherland's passage to England and to authorize a payment to her of Rs. 15,750, which amount was accordingly paid to Mrs. Sutherland."

The reserve was created by setting aside annually a sum equal to one and a half months' salary. The cheque for the amount was sent to the proctors for Mr. Sutherland's estate and it was drawn in their favour. They paid the sum, less a small and unexplained deduction, to a Mr. Adamson, who appeared to have held a power of attorney for Mrs. Sutherland, and he paid it to her as a sum free from all tax liability. The company, on March 15, 1947, made a return of Mr. Sutherland's income from employment for the period April 1, 1946, to the date of his death. The return was made by entering figures in blank spaces on a form which categorized the income from employment under a series of headings. Thus the first item was "gross salary Rs. 3,550" where the figure alone had to be filled in by the company. One of the items was "Leave Pay Rs." and opposite it the company entered no figure, but left the space for the figure blank. Another item was "Other remuneration (if any) Rs." There again the company left the space for the figure blank. But opposite that item it entered a note "Overdue leave pay Rs. 15,750 paid Messrs. Julius & Creasy, administrators of the estate." It was in consequence of that note that the assessment, made under section 11 (9) of the Ordinance for the period April 1, 1946, to June 12, 1946, in the year of assessment 1946-47, included the sum of Rs. 15,750.

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The facts with regard to the deceased's contract of employment were set out in paragraph 3 of the case, where two paragraphs were incorporated from a letter, D8 of the documents, written by the company's accountants in reply to an inquiry by the assessor. The first of those paragraphs read: "We advise that there is no written agreement to show the late Mr. Sutherland's contract of service with this company. It has, however, been the normal practice of the company to pay leave pay in proportion to the length of service which has elapsed without leave." The second paragraph read: "Mr. Sutherland took up duties as managing director in December, 1939, and although there was nothing in writing, he was understood to be on a normal four-year contract, with six months' leave on full pay and the passage money to be paid by the company for him and his wife." Statement 3 continued with this finding by the board: "It is common ground that the deceased's contract of service was for the normal four-year period with six months' full pay leave and the cost of passages to the United Kingdom for himself and his wife."

The members of the Board of Review who heard the appeal were not unanimous in affirming the assessment. The two members who formed the majority held that Mr. Sutherland, though he had never taken leave, was entitled to be paid leave pay in proportion to his length of service without leave. They said that the practice of paying leave pay when no leave was taken was fairly common in mercantile firms in Ceylon, and that the leave pay was generally paid when the employee eventually did go on leave or retired. They found that when Mr. Sutherland died on June 12, 1946, there had accrued to his account a sum of Rs. 15,750. They were aided in arriving at that conclusion by the construction which they put on the directors' resolution of July 17, 1946, and by certain opinions elicited from the company by requests for information addressed to it by its own assessor. The dissenting member of the board held that if an employee under such a contract as Mr. Sutherland's took no leave he was not entitled to any leave pay, and that his heirs on his death could have no claim. He construed the resolution of July 17, 1946, as meaning "had Mr. Sutherland not died a sum would have been available to pay him leave pay; owing to his death he could not get this. We will, however, pay that sum to his widow although the deceased was not entitled."

The Supreme Court (Jayatileke C.J. and Gunasekara J.)

referred to correspondence between the company, through its officers, and its assessor or the assessor for Mr. Sutherland's estate. In that correspondence the company expressed varying and contradictory opinions about the character of the sum in question. Sometimes it was said that the payment was an *ex gratia* payment to the widow, and sometimes that was denied and it was said that it was a sum legally due to Mr. Sutherland at his death. But the court rejected all such expressions of opinion as irrelevant, and their unanimous judgment proceeded on the terms of the contract of employment as set out in paragraph 3 of the stated case. They held that it was not shown that the practice by which leave pay was paid when no leave had been taken was part of the contract in Mr. Sutherland's case, and that there was no other evidence that his contract included a term entitling him to claim a money payment in lieu of leave.

The Commissioner of Income Tax now appealed.

The relevant provisions of the Income Tax Ordinance (c. 188), as amended by subsequent ordinances to the date of the deceased's death, were the following:—

Section 5 (1): "Income tax shall, subject to the provisions of this Ordinance . . . be charged . . . in respect of the profits and income of every person . . . (a) wherever arising, in the case of a person resident in Ceylon, and (b) arising in or derived from Ceylon, in the case of every other person."

Section 6 (1): "For the purposes of this Ordinance, 'profits and income' or 'profits' or 'income' means—(b) the profits from any employment."

Section 6 (2) (as amended by section 2 of the Income Tax (Amendment) Ordinance, No. 25 of 1939): "For the purposes of this section—(a) 'profits from any employment' includes—(i) any wages, salary, leave pay, fee, pension, commission, bonus, gratuity, or perquisite, whether derived from the employer or others, except the value of any holiday warrant, passage, or other form of free conveyance granted by an employer to an employee, or any allowance for the purchase of any such conveyance in so far as it is expended for such purpose; (v) any other allowance granted in respect of employment whether in money or otherwise."

Section 7 (1): "There shall be exempt from the tax—(k) any capital sum received by way of retiring gratuity (other than a sum received in commutation of pension) or death gratuity or as consolidated compensation for death or injuries."

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Section 11 (1): "Save as provided in this section, the statutory income of every person for each year of assessment from each source of his profits and income in respect of which tax is charged by this Ordinance shall be the full amount of the profits or income which was derived by him or arose or accrued to his benefit from such source during the year preceding the year of assessment, notwithstanding that he may have ceased to possess such source or that such source may have ceased to produce income. (9) Where any person dies on a day within a year of assessment, his statutory income for such year shall be the amount of profits and income of the period beginning on the first day of April in that year and ending on that day."

Section 27: "The executor of a deceased person shall be chargeable with the tax for all periods prior to the date of such person's death with which the said person would be chargeable if he were alive, and shall be liable to do all such acts, matters and things as the deceased person if he were alive would be liable to do under this Ordinance."

Section 55 (2): "Every person who is an employer shall, when required to do so by notice in writing given by an Assessor, furnish within the time limited by such notice a return containing the names and places of residence and the full amount of the remuneration, whether in cash or otherwise, for the period specified in the notice, of—(a) all persons employed by him in receipt of remuneration in excess of a minimum figure to be fixed by the Assessor; and (b) any other person employed by him named by the Assessor. (3) Any director of a company, or person engaged in the management of a company, shall be deemed to be a person employed by the company."

Section 69 (1): "Any person aggrieved by the amount of an assessment made under this Ordinance may within twenty-one days from the date of the notice of such assessment appeal to the Commissioner by notice of objection in writing to review and revise such assessment. Any person so appealing (hereinafter referred to as 'the appellant') shall state precisely in his notice the grounds of his objection and the notice shall not be valid unless it contains such grounds and is made within the period above mentioned. (6) In disposing of an appeal the Commissioner may confirm, reduce, increase, or annul the assessment, and shall record his determination in writing and announce it orally."

Section 70 provides for appeals to the Board of Review against the decision of the Commissioner, and section 73 provides for the regulation of such appeals.

Subsections (4) and (7) of section 73 are as follows: “ (4) The onus of proving that the assessment as determined by the Commissioner on appeal . . . is excessive shall be on the appellant. “ (7) At the hearing of the appeal the Board may, subject to the provisions of section 71 (4), admit or reject any evidence adduced, whether oral or documentary, and the provisions of the Evidence Ordinance, relating to the admissibility of evidence, shall not apply.”

Section 74 (1): “ The decision of the Board shall be final: “ Provided that either the appellant or the Commissioner may “ make an application requiring the Board to state a case on a “ question of law for the opinion of the Supreme Court.”

1952. April 24, 28, 29. *Millard Tucker Q.C.* and *Sir Reginald Hills* for the appellant. The main question is whether the Rs. 15,750 received by the respondent was an amount due to her husband or his estate under the terms of his contract of employment and received by her qua executrix, or whether it was a voluntary payment by the company by way of gift to her as his widow. What the terms of service of the deceased were is a question of fact, and what is the effect of them is a question of law. The court cannot interfere with findings of fact unless there is no evidence to support them, or they are against the weight of evidence. It is the duty of the assessee to overthrow the assessment, and not for the Crown to support it: section 73 (4) of the Income Tax Ordinance. That can only be done by showing that there was no legal liability on the company to pay the deceased a penny. The company had, however, year by year credited to a reserve fund the leave pay which the deceased was contingently entitled to. That means, it is submitted, that he gets this six months' full pay whether he goes on leave or whether he dies; it does not matter if he leaves the company's service and takes other employment, he would still get the six months' pay. He could have sued for the first four years' leave pay—Rs. 9,000—but as regards the remainder, although he gets one and a half months' leave pay a year, he could not sue for it until his four years had expired. To the extent of Rs. 9,000 at least, therefore, the assessment was valid. There was no evidence that the sum in question or any part of it was a capital sum paid to and received by the respondent by way of a death gratuity within the

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meaning of section 7 (1) (k) of the Ordinance. *Guillain v. Commissioner of Income Tax*¹ contains some relevant observations:

“ This court can interfere only if there is some error of law—it being, of course, an error of law if a finding of fact is arrived at with no evidence to support it,”² and “ once an assessment has been made . . . there arises a rebuttable presumption that “ the official act of assessment has been rightly and regularly “ performed.” The Rs. 15,750 was remuneration earned by the deceased during his lifetime, being pay in lieu of leave which he was entitled to take but did not take; it was not a personal gift to the respondent, but was in fact paid to and received by her as executrix of the estate of her husband and was properly included in the assessment as being profits from his employment. The Crown do not ask for an order for costs before this Board.

Sir Reginald Hills followed.

Roy Borneman Q.C. and *C. N. Beattie* for the respondent. The only issue in this case is whether the deceased was entitled to this money by the terms of his contract. He was not so entitled to this sum of Rs. 15,750, or any part of it, at any time. The phrase “ leave pay ” has not been defined anywhere; it is used in the Ordinance, and it is therefore a matter of construction what it means. *Prima facie* it means pay while on leave, and it is not pay in lieu of leave. That is the construction which should be reached unassisted, just looking at the facts. The finding of the Board of Review that “ the leave pay becomes “ due when the employee who is entitled to leave with full pay “ does not go on leave, although it is generally paid when he “ eventually does go on leave or retires ” is merely an expression of opinion of what the practice is, what they described as “ this practice of paying leave pay is fairly common in mercantile firms ”; those two paragraphs of the finding should be read together. What the Board of Review are trying to do there is to write the contract between the company and the deceased. Those words are so loose that this Board should not accept them as evidence that that term was incorporated into the deceased’s contract. The passage in the letter of March 15, 1949, from the company’s accountants to the assessor that the deceased “ was “ understood to be on a normal four-year contract with six “ months’ leave on full pay and the passage money to be paid “ by the company for him and his wife ” shows *prima facie* that payment is contingent on his taking leave. Perhaps the most

¹ (1949) 51 C.N.L.R. 241.

² *Ibid.* 247.

vital part of this case is that the deceased became entitled to the money in 1943 (in respect of a completed term of four years) but he did not claim it. The respondent gets the sum personally, and not as executrix of her husband, and that is what the resolution of July 17, 1946, purported to do. It is clear from that resolution that the company had not treated the deceased as a creditor. If the company had not paid, the executrix could not have sued. The resolution is consistent with saying to the respondent "here is Rs. 15,750 for you." On construction of this contract it is clear that the deceased was not entitled to any part of this money; he was not entitled to leave pay unless and until he took leave, and in as much as he died without taking leave neither he nor his estate became entitled to any payment in respect of leave pay. The payment was made to the respondent *ex gratia* and not as of right.

If the finding of the Board of Review that "the leave pay "was earned and had accumulated" be right, and the sum to which he was entitled was due and payable in 1943—at the end of four years—then that sum could only be assessed in the assessment year 1944–45, i.e., as being income of the preceding year: section 11 (1) of the Ordinance. Although this point was not taken below, the respondent should be permitted to raise it now. [Reference was made to *Smyth v. Stretton*.³] This Board should not make such an order as would result in a patently bad assessment being confirmed. With regard to the onus being on the taxpayer, all that the Ceylon Ordinance does is to put into statutory form what is the well-accepted principle in England: *Guillain v. Commissioner of Income Tax*.⁴

Tucker Q.C. in reply. The question is, does this payment fall within the description "leave pay" in section 6 (2) (a) (i), or "any other allowance" in section 6 (2) (a) (v) of the Ordinance? The words in the resolution "contingent liability" show that the deceased had some right. The payment was made to the estate and was intended to be so made, and not to the respondent personally. In *Edwards (Inspector of Taxes) v. Roberts*⁵ *Smyth's* case⁶ was explained.

June 10. The judgment of their Lordships was delivered by LORD NORMAND, who stated the facts and statutory provisions set out above and continued:—The respondent's contention has been at all stages of the proceedings that the sum was paid as

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³ (1904) 5 Tax Cas. 36, 42.⁵ (1935) 19 Tax Cas. 618, 638.⁴ 51 C.N.L.R. 241.⁶ 5 Tax Cas. 36.

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a gratuitous payment to her personally, and not to her qua executrix as a profit of employment due to her husband or his estate. She has also put forward alternative contentions which will fall to be considered only if her first contention fails.

Counsel for the appellant, in opening the case, represented that it involved general questions of importance in the administration of the income tax law, but as the argument developed it became apparent that the question of the nature of the payment and its assessability to income tax depended on the special facts of the case.

When, as in this case, the true question is whether a payment was made *ex gratia* or in discharge of a contractual obligation the primary and best evidence is the contract. If the contract is in writing or, if it is oral but its terms are known beyond doubt, the question whether the payment was contractual depends on the contract alone. But if the contract is oral and if the direct evidence leaves it in doubt whether or not it contained a term providing for the payment, it is legitimate to have regard to the circumstances surrounding the payment and receipt, and in such a case the evidence of the surrounding circumstances may be used to show what the terms of the contract in fact were. But in this case the circumstances attending the payment and receipt of the money are of no assistance. The payment by cheque to the proctors for Mr. Sutherland's estate favours the contention that it was a payment due under the contract of employment. But the language of the directors' resolution, which their Lordships construe in the same sense as the dissenting member of the Board of Review, and all the other circumstances favour the contention that it was an *ex gratia* payment to Mr. Sutherland's widow. No reasonably safe inference about the nature of the contract or its terms can be drawn from these conflicting circumstances. The opinions of the company about the intendment of the contract are irrelevant. Though such opinions may have been received in evidence under section 73 (7) of the Ordinance they are not in law admissible as aids to the construction of the contract. The language of section 73 (7) is very wide, but it does not go so far as to authorize the Board to ignore the rule that construction is a matter of law and not of evidence. The note written in the income tax return made by the company, on which the appellant's counsel greatly relied, does not help his argument. A statement made in a return is evidence against those who make the return, but statements made by employers in returning the income of an employee are not evidence against

him. In this case, moreover, the return was non-committal on the question whether the payment was contractual, and the note referring to it was very properly written on the return in order that there should be no reproach of non-disclosure of a payment that might eventually be found to have been due under Mr. Sutherland's contract with the company.

It remains to consider the only direct evidence about the terms of the contract. It is to be found in statement 3 of the case. The company was clearly in great doubt about the terms, and in the letter D8 it strove to set them out as fairly as it could. The letter, in the two paragraphs quoted in statement 3, purports to deal with two separate things: first, the company's normal practice of paying leave pay in proportion to the length of service which had elapsed without leave, and second, the company's understanding of Mr. Sutherland's contract which is described as a normal four-year contract with six months' leave on full pay. It is the contract so described in the second paragraph that is found by the Board of Review to be common ground between the parties. The respondent is entitled to have the terms of the contract, as described in the letter and found to be common ground, construed in their natural sense and without the addition of unexpressed terms unless they are clearly implied. The words which have to be construed are "a normal four-year contract with six months' leave on full pay." Their Lordships find no ambiguity in this description; it means a contract for four years' service with six months' leave, which leave shall be on full pay. If that is the true construction there is no basis for a claim by Mr. Sutherland's executrix for pay in lieu of leave on his death without having had leave. The normal practice of the company is not expressly incorporated and there is no need or justification for implying a term by which the company would be bound to pay leave pay when no leave was taken. The contract before the Board therefore did not provide for any payment of leave pay except on a contingency which was never fulfilled, and the respondent has discharged the onus which rested on her (section 73 (4) of the Ordinance) by showing that the payment of Rs. 15,750 was not contractual and was not due to Mr. Sutherland's estate on his death.

Their Lordships will therefore humbly advise Her Majesty that the appeal should be dismissed. The appellant will pay the costs of the appeal.

Solicitors: *Burchells; Slaughter & May.*

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1952						AND	
May 28; July 1.	THE QUEEN	.	.	.	.	.	RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF BRITISH GUIANA.

Criminal Law — Evidence — Identification — Hearsay — Admissibility—Res gestae—Principles applicable—Costs.

At the trial of the appellant on a charge of maliciously and with intent to defraud setting fire to a shop in which he carried on the business of a dry goods store, evidence given by a police constable was admitted for the purpose of identification, and without objection, that: "I heard a woman's voice shouting 'Your ' place burning and you going away from the fire'; immediately "then a black car" came from the direction of the fire, and "in "the car was a fair man resembling accused. I did not observe "the number of the car. I could not see the fire from where I was "standing." In cross-examination he said that he did not know who or where the woman was. She was not a witness at the trial, and it was common ground that the incident took place at a distance of more than a furlong from the site of the fire and that it happened not less than 26 minutes after the fire was started:—

Held, that the words spoken by the woman (did not form part of the *res gestae*) and were not therefore excepted from the fundamental rule against the admission of hearsay evidence. (The evidence was wrongly admitted) and (there being no other evidence of identification which was of any value,) and the circumstantial evidence which alone the Crown had to rely on to connect the appellant with the commission of the crime being inconclusive for the purpose, the conviction was set aside.

While it could not be said that there was no legal evidence to support a verdict of guilty, nevertheless the admission of the police constable's hearsay evidence was, having regard to the weakness of the other evidence, so prejudicial to the accused that it deprived him of the substance of a fair trial and the protection of the law, and he had discharged the burden of establishing that there had been a real miscarriage of justice.

To be admissible, it is essential that words sought to be proved by hearsay evidence should be, if not absolutely contemporaneous with the action or event, at least so clearly associated with it in time, place and circumstances, that they are part of the thing being done, and so an item or part of real evidence and not merely a reported statement. Hearsay evidence for the purpose of identification should only be allowed if it satisfies the strictest test of close association with the event in time, place and circumstance, and in a criminal trial the event with which the words sought to

* *Present*: LORD NORMAND, LORD OAKSEY and LORD TUCKER.

be proved must be so connected as to form part of the *res gestae* is the commission of the crime itself—here the setting fire to the building.

Regina v. Bedingsfield (1879) 14 Cox C.C. 341; *O'Hara v. Central S.M.T. Co.* 1941 S.C. 363; *Rex v. Christie* [1914] A.C. 545; and *Regina v. Gibson* (1887) 18 Q.B.D. 537 considered.

There were no circumstances which would justify a departure from the ordinary rule of practice of the Board against giving costs to the successful appellant in a criminal appeal.

Johnson v. The King [1904] A.C. 817, 825 applied; *Waugh v. The King* [1950] A.C. 203 distinguished.

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APPEAL (No. 47 of 1951), by special leave, against the conviction of the appellant, Lejzor Teper, in the Supreme Court of British Guiana (Hughes J. and a jury) (February 7, 1951), on the charge that he maliciously and with intent to defraud set fire on October 9, 1950, to a shop belonging to his wife in Regent Street, Georgetown, in which he carried on the business of dry goods store. He was sentenced to seven years' penal servitude. It was clearly proved that the shop had been maliciously set on fire. On the intent to defraud the Crown's case was that the appellant, having insured the building and stock for sums considerably above their real value, set fire to them with the intention of claiming against the insurance companies.

The grounds of the appeal were that hearsay and incompetent evidence was admitted for the purpose of identifying the accused as the man who set the premises on fire, that that evidence was in a high degree prejudicial to the appellant, and that the other evidence against him was such that no reasonable jury, properly directed, could have convicted him on it alone, or at least that it was so flimsy and inconclusive that it must have been outweighed by the hearsay evidence in the jury's consideration of the evidence as a whole. The contentions for the Crown were that the impugned evidence was properly admitted as part of the *res gestae*, that even if it was inadmissible the appellant suffered no real prejudice, and that the other evidence was amply sufficient to entitle a reasonable jury to convict.

The witness whose evidence was impugned was police constable Cato. He came on duty about 2 a.m. on October 9 and then went along a street named Camp Street towards Regent Street. He heard a shout of fire, and then one fire engine passed, and after it a second fire engine, both going along Regent Street. He stopped at the corner of Regent and Camp Street. His evidence continued: "There were crowds going east and west

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In British Guiana provision had now been made for a Court of Criminal Appeal, but at the date of this conviction the only means of bringing it under judicial review was by a case stated by the judge of the court before whom the cause had been tried for the opinion of the Court of Appeal (Criminal Law (Procedure) Ordinance, Title 12). The appellant applied to the judge to state a case on the admissibility of Cato's evidence, but the application was refused. The decision of the judge refusing the application was not under appeal.

1952. May 26, 27, 28. *G. D. Roberts Q.C., Dingle Foot, C. Lloyd Luckhoo* and *M. P. Solomon* for the appellant. In view of the fact that no one had identified the man seen driving the car as the appellant the trial judge was wrong in holding that the words which the witness Cato heard a woman use were admissible as part of the *res gestae*. The fact that the evidence was not objected to by the appellant is, on the authorities, immaterial; no injustice, no breach of the rules of fair trial can be waived by counsel for the accused. Instead of directing the jury that the evidence in question, although not conclusive, might " tie up " with other evidence, the judge should have directed the jury to disregard this evidence altogether. The evidence cannot be taken as truth of the statement, but merely of the fact that the statement was made. The prosecution made out no case; they did not prove that the appellant was on the spot at the time, and it was not suggested that he was under any financial stringency—exactly the opposite was proved by the prosecution. Certainly there was a deliberate setting on fire by somebody who used petrol, but that in itself is not sufficient. The appellant was stocking his premises all the time, and that is the last thing he would do if he intended to set fire to his store; he said that to do

so would be burning his living. None of the elements of deliberate arson which one would expect to find is present here.

The trial judge refused to state a case for the consideration of the Court of Appeal in British Guiana. (A Court of Criminal Appeal in British Guiana has been created only this year, and therefore it has no jurisdiction over the present appeal.) It is submitted that the two authorities cited by the trial judge in his decision not to state a case—*The Schwalbe*¹ and *Mersey Docks Board v. Liverpool Gas Co.*²—are no support at all for the admission of this evidence. Its admission as part of the *res gestae* is carrying the rule very much further than it has ever been carried before. The prosecution, having had no evidence of identity at all, have sought to introduce evidence which cannot be cross-examined, and in respect of which all the normal safeguards are missing; that raises a question of natural justice and justifies the intervention of this Board. There appears to be no case in which this rule of the admission of hearsay evidence as part of the *res gestae* has ever been used in an endeavour to give evidence of identity.

With regard to the relevant authorities on the question of statements admitted as part of the *res gestae*, apparently the first use or application of the rule was in *Thompson v. Trevanion*.³ It was said in *Rouch v. G.W. Ry.*⁴ that “the principle of” admission is, that the declarations are *pars rei gestae*.” The rule has been laid down in later cases: *Rex v. Foster*,⁵ and *The Schwalbe*,⁶ on which the judge below relied. The leading case is *Regina v. Bedingfield*,⁷ which, it is submitted, corrected the somewhat too wide decisions of the period before 1879, and it was approved later in *Rex v. Christie*⁸ in the House of Lords. *Regina v. Gibson*⁹ is in some respects not unlike the facts of the present case: in that case Lord Coleridge C.J. said: “I am of” opinion that this conviction must be quashed. At the trial the “statement of a passer-by as to where the prisoner had gone was” received in evidence as tending to his identification. It is “admitted that the statement was not made in the prisoner’s” hearing, and therefore could not legally be given in evidence “against him.” It seems uncertain how far any of these cases on the *res gestae* rule admit evidence of identification. In

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*Gibson's case*⁹ it was an anonymous woman's statement which was offered in evidence to strengthen the prosecution evidence as to identity, and neither counsel for the prosecution nor the judge ever apparently considered it possible to suggest that this statement of an unidentified bystander was part of the *res gestae*. [Reference was also made to *Rex v. Thomson*.¹⁰] *Rex v. Christie*¹¹ is a very long way from the facts of the present case, but there are some references to *res gestae*: *per* Lord Atkinson¹²: "The boy's statement was so separated by time and "circumstances from the actual commission of the crime that it "was not, I think, admissible as part of the *res gestae*"; and Lord Reading said¹³: "In my view it was not so immediately "connected with the act of assault as to form part of the *res gestae*," and *Regina v. Bedingfield*¹⁴ was cited. It does underline again the need for spontaneity—contemporaneity; there it was not sufficiently contemporaneous to be part of the *res gestae*. ✓

There is one slightly different point. As stated in Phipson on Evidence, 8th ed., at p. 61: "Declarations are no proof of the "fact they accompany; the existence of the fact must be "established independently." If the statement of the unidentified woman in the present case was admissible at all, it would only be admissible to prove that she thought that she saw the owner of a building which she thought was on fire. It would not be evidence to prove, or support any evidence, that the appellant was at the scene of the fire. She might not even have known which building was on fire. In support of the contention that the statement is not evidence of the truth of the matter—stated, see *Lloyd v. Powell Duffryn Steam Coal Co. Ltd.*¹⁵

No case is to be found which comes anywhere near this case, suggesting that the statement of this unidentified woman 230 yards away from the fire and 26 or more minutes after it started could be admissible on the authority of any known principle, or be said to be part of the *res gestae*. An irregularity in the trial cannot be cured by consent of counsel: *Abdul Rahman v. King-Emperor*.¹⁶ There was no other evidence of identification and therefore it cannot be said, having regard to all the circumstances of the case, that if this evidence had been excluded a reasonable jury, properly directed, must have found the appellant guilty,

⁹ (1887) 18 Q.B.D. 537, 540.

¹⁰ [1912] 3 K.B. 19, 21.

¹¹ [1914] A.C. 545.

¹² *Ibid.* 556.

¹³ *Ibid.* 566.

¹⁴ 14 Cox C.C. 341.

¹⁵ [1914] A.C. 733, 752.

¹⁶ (1926) L.R. 54 I.A. 96.

and there has been a substantial miscarriage of justice justifying the intervention of the Board in accordance with the well-known rule: *Dharmasena v. The King*.¹⁷ The accused has been deprived of a fair trial in this case. The circumstances of this case are such that the appellant should be given his costs throughout: *Johnson v. Rex*¹⁸ and *Waugh v. The King*.¹⁹

C. Lloyd Luckhoo followed, and dealt with the facts, the evidence and the time factor.

Gahan Q.C. and Godfrey Le Quesne for the Crown. In *Renouf v. Attorney-General for Jersey*²⁰ the Board recognized that there had been a serious misdirection, but nevertheless they dismissed the appeal. On the facts of the present case, if any inadmissible evidence were excluded a reasonable jury properly directed and having regard only to admissible evidence would have convicted the accused, and there has been no substantial miscarriage of justice. First, on the question whether or not the impugned evidence was admissible, it is difficult to get a clear statement from the authorities as to the rule governing the admission of hearsay evidence as part of the *res gestae*. What is the *res*? In this case it might be either of two things, the fire, or the evidence given of the incident in which Cato observed this motor-car. If it be taken as the setting of the fire and all the incidents connected with it, there is, it is frankly admitted, the greatest difficulty in saying that what some person stated was part and parcel of the fire. It would not be possible for evidence to be given that this or that spectator at the fire heard some other spectator say that he had seen the accused at the scene of the fire; that could only be proved by direct evidence of the person who saw the accused at the scene. The evidence of Cato was in effect that this woman's shout directed his attention to a motor-car, and that therefore he observed a motor-car and saw in it a person whom he could not definitely identify, but it was a fair man resembling the accused. The evidence of Cato properly included evidence, as part of the *res gestae*, of the contemporaneous remark which caused him particularly to notice the passing motor-car and its driver. [Reference was made to *O'Hara v. Central S.M.T. Co.*,²¹ to Stephen's Digest of the Law of Evidence, art. 3, and to the judgment of Parke B. in *Wright v. Doe. d. Tatham*.²²] There is nothing to show that this evidence, if it were inadmissible, had any serious prejudicial

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effect, and there has been no miscarriage of justice: *Stirland v. Director of Public Prosecutions*.²³ If there is such evidence that any reasonable jury properly directed and confining its attention to the admissible evidence, would convict, then the conviction would stand although counsel had raised no objection to the reception of inadmissible evidence. Apart from Cato's evidence, the guilt of the accused was proved beyond any reasonable doubt.

The practice is that in no criminal appeals, unless there are very exceptional circumstances, will the Board allow costs. The general rule is expressed in *Shamdasani v. King Emperor*.²⁴

Le Quesne followed.

G. D. Roberts Q.C. replied.

May 28. Lord Normand announced that their Lordships would humbly advise Her Majesty that the appeal should be allowed, and that they would give their reasons later.

July 1. The reasons of their Lordships for allowing the appeal were delivered by LORD NORMAND, who stated the facts set out above and continued:—An important question of principle is involved in the issue on the admission of the evidence, and their Lordships propose to deal with it at once. That approach to the appeal carries with it no inconvenience, for this evidence is concerned with an incident which stands apart from the matters dealt with in the rest of the evidence.

The rule against the admission of hearsay evidence is fundamental. It is not the best evidence and it is not delivered on oath. The truthfulness and accuracy of the person whose words are spoken to by another witness cannot be tested by cross-examination, and the light which his demeanour would throw on his testimony is lost. Nevertheless, the rule admits of certain carefully safeguarded and limited exceptions, one of which is that words may be proved when they form part of the *res gestae*.
✓ The rules controlling this exception are common to the juris-
prudence of British Guiana, England and Scotland. It appears
| to rest ultimately on two propositions, that human utterance is
both a fact and a means of communication, and that human
action may be so interwoven with words that the significance of
the action cannot be understood without the correlative words,
and the dissociation of the words from the action would impede
the discovery of truth. But the judicial applications of these

²³ [1944] A.C. 315, 327.

²⁴ (1945) L.R. 72 I.A. 189.

two propositions, which do not always combine harmoniously, have never been precisely formulated in a general principle. Their Lordships will not attempt to arrive at a general formula, nor is it necessary to review all of the considerable number of cases cited in the argument. This, at least, may be said, that it is essential that the words sought to be proved by hearsay should be, if not absolutely contemporaneous with the action or event, at least so clearly associated with it, in time, place and circumstances, that they are part of the thing being done, and so an item or part of real evidence and not merely a reported statement: *The Queen v. Bedingfield*,²⁵ *O'Hara v. Central S.M.T. Co.*²⁶

How slight a separation of time and place may suffice to make hearsay evidence of the words spoken incompetent is well illustrated by the two cases cited. In *Bedingfield's* case²⁷ a woman rushed with her throat cut out of a room in which the injury had been inflicted into another room where she said something to persons who saw her enter. Their evidence about what she said was ruled inadmissible by Cockburn C.J. In *O'Hara's* case,²⁸ a civil action, the event was an injury to a passenger brought about by the sudden swerve of the omnibus in which she was travelling. The driver of the omnibus said in his evidence that he was forced to swerve by a pedestrian who hurried across his path. Hearsay evidence of what was said by a man on the pavement at the scene of the accident as soon as the injured party had been attended to was held to be admissible in corroboration of the driver's evidence. But what was said 12 minutes later, and away from the scene, by the same man was held not part of the *res gestae*. In *Christie's* case,²⁹ the principle of the decision in *Bedingfield's* case³⁰ was approved by Lord Reading, with whom Lord Dunedin concurred, and no criticism of it is to be found in the speeches of the other noble and learned Lords who sat with them. In *The Queen v. Gibson*³¹ the prosecutor gave evidence in a criminal trial that, immediately after he was struck by a stone, a woman going past pointing to the prisoner's door said, "the person who threw the stone went in there." This evidence was not objected to at the trial, but it was admitted by counsel for the prosecution in a case reserved that the evidence was incompetent. The conviction was quashed,

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and from their judgments it is clear that the judges who took part in the decision were far from questioning the correctness of counsel's admission. In *Gibson's* case³¹ the words were closely associated in time and place with the event, the assault. But they ~~were not directly connected with that event itself.~~ They were not words spontaneously forced from the woman by the sight of the assault, but were prompted by the sight of a man quitting the scene of the assault and they were spoken for the purpose of helping to bring him to justice.]

The special danger of allowing hearsay evidence for the purpose of identification requires that it shall only be allowed if it satisfies the strictest test of close association with the event in time, place and circumstances. "Identification is an act of the mind, and the primary evidence of what was passing in the mind of a man is his own testimony, where it can be obtained. It would be very dangerous to allow evidence to be given of a man's words and actions, in order to show by this extrinsic evidence that he identified the prisoner, if he was capable of being called as a witness and was not called to prove by direct evidence that he had thus identified him": *Christie's* case, per Lord Moulton.³²

(There is yet another proposition which can be affirmed, that for identification purposes in a criminal trial the event with which the words sought to be proved must be so connected as to form part of the *res gestae*, is the commission of the crime itself, the throwing of the stone, the striking of the blow, the setting fire to the building or whatever the criminal act may be.) The respondent's counsel submitted that any relevant event or action may be accompanied by words which may have to be proved in order to bring out its true significance. There is a limited sense in which this is true, but it is not always true, and much depends on the use to be made of the evidence. In *Christie's* case³² hearsay evidence of certain words uttered by a child, the victim of an indecent assault, in the presence and hearing of the accused were held to be admissible in explanation of the demeanour of the accused in response to them. (But the evidence was held inadmissible for the purpose of showing that the child identified the accused as his assailant.) In the present case identification is the purpose for which the hearsay was introduced, and its admission goes far beyond anything that has been authorized by any reported case.

Before assessing the prejudice caused by the wrongful admission of the hearsay evidence, and deciding whether it affected the

³¹ 18 Q.B.D. 537.

³² [1914] A.C. 545, 558.

substantial justice of the trial, the nature and effect of the other evidence must be looked at. One important observation falls to be made at the outset. (There was no other evidence of identification that was of any value, and the effect of this on the jury's mind would not improbably be to throw into relief the hearsay evidence and to give it prominence.) Another result is that the Crown has to rely on circumstantial evidence only to connect the appellant with the commission of the crime. Circumstantial evidence may sometimes be conclusive, but it must always be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another. Joseph commanded the steward of his house, "put my cup, the silver cup, in the sack's "mouth of the youngest," and when the cup was found there Benjamin's brethren too hastily assumed that he must have stolen it. It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.

(Over-insurance of the stock or building by the appellant would, if proved, have been a most material circumstance, and the Crown therefore made every effort to prove it. Their Lordships have carefully considered the evidence about the policies of insurance entered into by the appellant, and they are satisfied that the Crown's case on over-insurance completely broke down.) There was no attempt to obtain insurance without the inspection of the subjects insured by the companies' agents, and there was no concealment of previous policies when further cover was being negotiated. There was no evidence of irregular disposal of stock after insurance was effected, and no evidence that the appellant could have had any expectation of recovering more than the value of stock or buildings destroyed. (Furthermore, it was proved that the appellant had purchased and received delivery of goods for stock up to the eve of the fire, and that his dealings with wholesalers had been honest and above board.) It was also proved that he had in bank at the time of the fire a sum of about \$12,000. It was truly said that evidence of over-insurance goes to motive and that it is not necessary for the Crown to prove the motive of a crime. But the failure to prove motive in this case left the Crown with the heavy onus of satisfying the jury that the appellant wilfully destroyed his property without any proved prospect of gain.

The Crown relied greatly on evidence that the back door of the

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building, which had been locked by a padlock on the outside and also fastened by a bar fixed by nails on the inside when the shop was closed at 4 p.m. on the afternoon before the fire, was found at the time of the fire to be neither padlocked nor barred. The appellant had volunteered to the police a statement that he had returned to the shop at about 5.30 p.m. to get a satchel for his daughter. The suggestion is that he went back to the shop at that time to unfasten the bar on the inside and so to make it possible, when he returned at night to set fire to the premises, to enter quietly by the back door instead of by the front door, which made a noise when it was opened. There would have been great force in this if it had been proved that the windows were all securely fastened, but that was not proved. (It cannot be left out of account that someone other than the accused may have entered by a window after taking the precaution of unlocking the padlock of the back door so that he would have a ready means of escape after he started the fire. The evidence leaves the matter in a state of suspicion and doubt, but it is inconclusive.)

On the other hand, the appellant had the opportunity, and perhaps a better opportunity than anyone else, of preparing and carrying out the crime. There is evidence that, with the exception of some petrol, all the combustible materials, such as wooden boxes and straw, used to start the fire had been kept in the premises and that pains had been taken by the criminal to ensure the destruction of the stock book, cash book and some other business documents. (These are circumstances of suspicion pointing to the appellant, but an intelligent jury ought not to omit to consider that any criminal who maliciously set fire to the appellant's premises might naturally have first acquainted himself with their contents and might also have maliciously tried to make sure of the destruction of the appellant's business books, either in order to embarrass the appellant or to throw suspicion on him.)

Lastly, the Crown relied on the appellant's conduct. He does not appear to have been told by anyone that a fire had occurred on his premises. He said in his statements to the police that he spent the night of October 8 to 9 at home with his wife; he then said: "At 8 a.m. I was going to the Esso filling station to get "gasolene when I saw a crowd standing opposite my store; I "went up and noticed the building was gutted with fire and my "stock destroyed by fire. It was only then that I learnt of the "disaster." It was submitted that this shows a very casual attitude on the part of an innocent man whose property has been

burnt. But if the meaning of the statement is that the appellant gave only a cursory glance at his gutted store, it is almost equally inexplicable whether he was himself the cause of the fire or not.

(It is not profitable to speculate about the meaning which the jury may have attached to this piece of evidence or about the inference which they may have drawn from it.) There is more cogency in the point that, if his story was true, he had a good alibi and yet no member of his household was called to testify that he was at home in bed when the fire occurred.) That is a circumstance which might well have caused the jury to doubt the appellant's innocence. The appellant did not give evidence,³³ but the question is whether the Crown proved its case by competent evidence and in a trial which was not vitiated by the admission of incompetent evidence.

The circumstantial evidence falls short of conclusiveness, and a properly instructed jury having it alone before it would have had a more than usually difficult decision to make. There were several circumstances pointing to the appellant's guilt, and though not one of them alone was of great moment, yet junctajuvant and it could not have been said that there was no legal evidence to support a verdict of guilty. That, however, does not decide the issue of the appeal. It is now necessary to consider whether the admission of Cato's hearsay evidence was, having regard to the weakness of the other evidence, "something which" "deprived the accused of the substance of fair trial and the" "protection of the law" (*Ibrahim v. The King*³³; *Renouf v. Attorney-General for Jersey*³⁴; *Dharmasena v. The King*³⁵). It is a principle of the proceedings of the Board that it is for the appellant in a criminal appeal to satisfy the Board that a real miscarriage of justice has occurred. In *Dal Singh v. The King Emperor*,³⁶ it was observed in a case where this Board had no ground for doubting that the appellant had been properly convicted, that the mere admission of incompetent evidence, not essential to the result, is not a ground for allowing an appeal against conviction. In the same case it was stated that "the" "dominant question is the broad one whether substantial justice" "has been done" and that in the particular case the question was "whether looking at the proceedings as a whole, and taking" "into account what has properly been proved, the conclusion" "come to has been a just one."³⁷

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Their Lordships have therefore in the end to decide whether the appellant has shown that the improper admission of the hearsay evidence of identification was so prejudicial to the appellant, in a case where the rest of the evidence was weak, that the proceedings as a whole have not resulted in a fair trial. The test is whether on a fair consideration of the whole proceedings the Board must hold that there is a probability that the improper admission of hearsay evidence turned the scale against the appellant.

Their Lordships are satisfied that the hearsay evidence was in a high degree prejudicial. Its effect may be gauged by considering what Cato's evidence would have amounted to if it had been excluded. (He could then only have said that in consequence of something heard by him his attention was directed to a man driving a black car who resembled the appellant. This evidence would have been worthless for the purpose of identifying the appellant with the man who set fire to a building a furlong away and 26 minutes earlier.) It is the hearsay and the hearsay alone which gives dramatic force to Cato's otherwise valueless evidence of identification, and confers on it a specious importance. It is impossible to avoid the conclusion that the jury might well, and probably did, regard Cato's hearsay evidence as sufficient to turn the scale. Counsel for the Crown sought to belittle the prejudice. It was said that the fact that no objection was taken to it at the trial should be allowed "to have some bearing on the question whether the accused was really prejudiced" (*Stirland v. Director of Public Prosecutions*³⁸). That is a consideration which weighs in a case where the evidence improperly admitted would not by its nature cause serious prejudice, or where the other evidence left little or no reasonable doubt of the appellant's guilt. But it is of no real moment in the present case. It was also submitted that the direction of the judge in his charge sufficiently safeguarded the appellant. The jury were directed that the evidence was not conclusive, but that it could be taken along with other evidence, and that if from other facts the jury found that the accused was there, this evidence "tied up with it." Cato's whole evidence was accordingly left to the jury's consideration to make of it what they could along with the other evidence. It is not necessary to decide what would have been the result if there had been a clear direction to disregard entirely the hearsay evidence. But no

³⁸ [1944] A.C. 315.

direction short of that could avail to save the verdict, and the appeal must succeed.

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The result was intimated to the parties at the conclusion of the argument. Thereupon the appellant's counsel asked for the costs of the appeal and of the proceedings in the Supreme Court. The practice of the Board is against giving expenses to the successful appellant in a criminal appeal save in very special circumstances (*Johnson v. The King*³⁹), and special circumstances were found in *Waugh v. The King*.⁴⁰ In the present case there are no circumstances which would justify a departure from the ordinary rule of practice.

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Their Lordships have therefore humbly advised Her Majesty that the appeal should be allowed. There will be no order as to costs.

Solicitors: *Hy. S. L. Polak & Co.; Burchells.*

³⁹ [1904] A.C. 817, 825. ⁴⁰ [1950] A.C. 203.

NATIONAL BANK OF AUSTRALASIA LD. APPELLANT;
AND
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ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

Australia (Queensland)—Currency—Bank—Scheme of arrangement—Issue of stock—Australian and English registers—Right to transfer from one register to another—Voluntary liquidation—Redemption of stock—Nominal value in Australian pounds.

Pursuant to a scheme of arrangement between the Queensland National Bank and its creditors, which was sanctioned in 1897, the bank created interminable inscribed deposit stock which the registered holders of existing securities of the bank, which had arisen from deposits made either in London or in Australia, accepted in satisfaction and discharge of such securities. The scheme further provided, inter alia, that registers of the stock were to be kept at specified offices of the bank in Australia and in London, and that any registered holder was entitled at his option to have his stock

* *Present*: VISCOUNT SIMON, LORD NORMAND, LORD OAKSEY, LORD TUCKER and LORD COHEN.

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transferred from one register to another. Under the scheme the principal moneys were to be immediately repayable in the event, inter alia, of the bank being wound up. In 1947 the appellant bank, the National Bank of Australasia, became the holder of all the shares in the Queensland National Bank, and the latter went into voluntary liquidation. At that date there was £729,269 of its stock registered on the Australian registers, and £1,829,817 on the London register, and the question arose whether the bank's liability on redemption was for the nominal face value of the stock in English or in Australian pounds or partly in one currency and partly in the other:—

Held, that the obligations of the bank in respect of the stock sounded only in Australian currency irrespective of the place of registration. While the terms of the scheme must be looked at as a whole in the light of the relevant surrounding circumstances, the real question was one of construction of the words creating the stock. The most significant feature was that it could be moved from register to register, which went far to establish that it did not give a different right of repayment according to where it might for the time being be registered. That view was further supported by the facts that, inter alia, the stock was created by a Queensland bank; the governing order sanctioning the scheme was that of the Queensland court; certificates of the stock, wherever registered, were in the same form and certified that the stock was created pursuant to the scheme sanctioned by the Supreme Court of Queensland. Looking at the scheme as a whole, the liability of the bank in respect of the stock was for a fixed amount in Australian pounds, and was and always had been limited on redemption to paying to each registered holder Australian pounds equal to the nominal value of the stock held by him, and in the meantime to paying interest in Australian pounds on the principal moneys.

In view of the right to transfer from register to register the facts were essentially different from those in *Adelaide Electric Supply Co. v. Prudential Assurance Co.* [1934] A.C. 122, and the case was more like *Auckland Corporation v. Alliance Assurance Co.* [1937] A.C. 587 and *Bonython v. Commonwealth of Australia* [1951] A.C. 201.

Order of the High Court of Australia set aside.

APPEAL (No. 8 of 1952), by special leave, from an order of the High Court of Australia (March 19, 1951) which had varied the answers given by an order of the Supreme Court of Queensland (November 16, 1949) to certain questions arising in the voluntary liquidation of the Queensland National Bank Ltd.

The following facts are taken from the judgment of the Judicial Committee: This appeal raised the question whether the liability of the Queensland National Bank Ltd. (hereinafter called "the bank") in respect of its interminable inscribed deposit stock created under a scheme of arrangement between the bank

and its creditors which was sanctioned in the year 1897 sounded in English pounds or Australian pounds or partly in one currency and partly in the other.

The bank was incorporated as a limited liability company in Queensland in the year 1872. In 1878 it opened an office in London. A local board of directors was appointed with powers delegated by the bank. In the course of its operations the London branch accepted deposits, the amount of which, by March, 1893, exceeded £2,900,000. Those deposits carried interest at the rate of £4 to £5 per cent. per annum.

On May 15, 1893, the bank suspended payment. Petitions to wind up the bank were presented in Queensland, New South Wales, and in England. A scheme of arrangement (hereinafter referred to as "the old scheme") was prepared with a view to securing for the bank a moratorium and was brought before the appropriate courts in Queensland, New South Wales and England. At that time the bank owed the Queensland Government more than £2,000,000, and it owed creditors other than the Government, in England £2,897,000, in New South Wales £110,000, and in Queensland £1,860,000. The old scheme was duly sanctioned by the courts concerned. It provided that the debt owing to the Queensland Government was to be paid in full in terms of an agreement between the bank and the Government, and that creditors other than the Government were to accept, in satisfaction and discharge of their claims against the bank, certain securities described in the scheme as deposit receipts. Those were made interchangeable in certain events into negotiable deposit receipts or inscribed deposit stock. A moratorium was thus provided for the discharge of the bank's indebtedness to its creditors. Payment of the principal moneys and interest due in respect of the deposit receipts was to be made at the places where they had been payable before the old scheme became operative.

Pursuant to the old scheme the winding-up proceedings in each country were stayed. By the end of the year 1896 it had become clear that the moratorium provided by the old scheme was insufficient to enable the bank to find its feet, and a new scheme was prepared. Meetings of creditors were convened in Sydney and Brisbane pursuant to orders of the courts of New South Wales and Queensland respectively. In England, as it was impossible to obtain the sanction of the court to a scheme of arrangement unless the bank was being wound up, a petition was presented for the winding-up of the bank and a winding-up

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order was duly made. A meeting of creditors was then convened in England to consider the scheme. The scheme was approved by the requisite majorities at the meetings held in New South Wales, Queensland and England respectively, and was sanctioned by the Supreme Court of New South Wales on April 15, 1897, by the Supreme Court of Queensland on May 12, 1897, and by the High Court of Justice in England on June 4, 1897. By the same order the High Court of Justice stayed all proceedings in the winding up except for the purpose of carrying the order and scheme into effect.

The chief relevant provisions of the new scheme might be summarized as follows:—

Clause 1. "Court" was defined as the Supreme Court of Queensland; "Stock" as interminable inscribed deposit stock created in pursuance of clause 3 of the new scheme; and "The said securities" as deposit receipts, negotiable deposit receipts and the coupons thereof, and inscribed deposit stock issued or given to creditors under the old scheme or held by the bank for security for any advances made to them by the bank, and all similar documents held by creditors of the bank at the date of the old scheme and which had not been exchanged for any of the mentioned securities.

Clause 2. The Queensland Government was to receive in discharge of all principal moneys and interest then owing to such Government 15s. in the £ upon the principal moneys payable in five annual instalments beginning in 1917, carrying interest at the rate of $3\frac{1}{2}$ per cent. per annum and a further 5s. in the £ upon such principal moneys payable without interest out of profits or insofar as not so paid on July 1, 1921.

Clause 3. Within six months of the new scheme being sanctioned by the court, the bank was to create and allot to the registered holders of the said securities, stock carrying interest at the rate of $3\frac{1}{2}$ per cent. per annum to an amount equal to 75 per cent. of the principal moneys so secured after deducting from such principal moneys any fractional part of £1 owing to such registered holders respectively.

Clause 4. Each registered holder of the said securities was to surrender his securities under the old scheme at the office where such securities were payable and to accept in the discharge thereof an amount of stock equal to 15s. in the £ upon the principal moneys thereby secured. The interest on the stock was to be paid half-yearly at the offices in Queensland, Sydney and London respectively at which the stock was registered.

Clause 5. On default for six months in the payment of any interest payable on the stock, if the Government or registered holders of stock to an amount equal to two-thirds of the stock for the time being unredeemed, calculated at its par value, should call in the principal moneys secured by the stock, or on an order being made or an effective resolution being passed for winding-up the bank, the principal moneys were immediately to become payable.

Clause 6. The stock was to be issued and held subject to the provisions of the new scheme and to the conditions set forth in the schedule thereto.

Clause 7. Each half-year, of the bank's profits not reserved to meet contingencies, one-quarter was to be paid to the Government until 5s. in the £ of its debt had been paid, and one-half (or when the Government had received 5s. in the £, three-quarters) was to be carried to a special fund and, as the directors might determine, be distributed amongst the stockholders rateably until an aggregate amount or bonus equal to 5s. in the £ on the principal moneys secured by the said securities had been paid, and thereafter the special fund was to be applied in payment of moneys due to the Government under the new scheme. The remaining quarter of the bank's profits was to be carried for at least 10 years from March 31, 1897, to the bank's ordinary reserve fund.

Clause 10. After the Government had been paid in full, the bank might after notice redeem and cancel the whole or any part of the stock held by any stockholder at its market value but at not less than the par value together with so much of 5s. in the £ upon the amount of the principal moneys secured by the said securities in exchange for which such stock was allotted as had not been previously paid out of profits. The holder in accordance with such notice was bound to surrender the stock to be redeemed in exchange for payment including interest. Such surrender, delivery and payment was to be made at the office where such stock was registered.

Clause 12. So long as £500,000 was unredeemed one London director, not necessarily a shareholder of the bank, was to be appointed by the registered stockholders, and in Brisbane there were to be five directors, three of whom (not necessarily shareholders) were to be elected by the registered holders of the stock, each of whom was to have one, two, three or four votes according to whether his holding of stock was not less than £500, £2,000 or £5,000 or exceeding £5,000.

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Clause 13. As soon as conveniently might be after the new scheme was finally sanctioned by the court, the nominal capital of the bank was to be reduced from £1,600,000 divided into 200,000 shares of £8 each to £1,000,000 divided into 200,000 shares of £5 each.

Clause 14. The bank was, as soon as practicable after the new scheme had been finally sanctioned by the court, to make all necessary amendments or alterations in its articles of association for the purpose of giving effect to the scheme.

The chief relevant provisions of the schedule to the new scheme might be summarized as follows:—

Clause 1. Registers of the stock were to be kept by the bank at its head office in Brisbane or at its branch offices in Queensland, Sydney or London (as the case might be) at which the securities in exchange for which such stock was allotted were at the time of such allotment payable, or at the office of the bank to which such stock might be transferred as provided by clause 3 of the schedule.

Clause 3. Any registered holder of any stock was entitled to require the manager at the office where the stock was for the time being registered to have the stock transferred at his own expense to the register kept at any other office, and upon such transfer being effected the said stock was to be deemed to be registered at the last-mentioned office.

Clause 5. Every registered holder was to be entitled to a certificate of his stock in the form or to the effect following:—

THE QUEENSLAND NATIONAL BANK LIMITED.

Interminable Inscribed Deposit Stock.

No.

£

Bearing interest at the rate of $3\frac{1}{2}$ per cent. per annum, payable on the 31st day of March and the 30th day of September in each year.

This is to certify that

of

is the registered holder of of the above stock, which stock is constituted pursuant to the provisions of the scheme of arrangement sanctioned by the Supreme Court of Queensland on the day of , 189 , and is issued subject to the provisions and conditions therein, and in the schedule thereto respectively contained.

Clause 10. Prescribed the form of transfer. That expressed the transfer to be made "in consideration of the sum of £ ."

Clause 14 provided for a fee of 2s. 6d. being payable for the registration of each transfer. Clause 21 provided for the payment of a sum not exceeding 2s. 6d. for any new certificate issued in replacement of certificates worn out, defaced, lost or destroyed.

The whole of the indebtedness of the bank to the Government had been discharged before the resolution to wind up the bank hereinafter mentioned was passed.

Pursuant to the new scheme, the bank created stock to an amount of £3,116,621, of which £1,083,097 was inscribed on the Australian register and £2,033,524 was inscribed on the London register. Transfers of stock between persons and between registers took place, and the bank from time to time itself bought various amounts of the stock. In the result, at the date of the winding-up resolution there was £729,269 of the stock registered on the Australian register and £1,829,817 thereof registered on the London register. The bonus of 5s. in the £ to which the stockholders were entitled under clause 7 of the scheme had been paid to them in full by the end of the year 1918.

From the commencement of the scheme the bank paid interest on stock registered on the London register in English currency at the rate of $3\frac{1}{2}$ per cent. per annum on the face value thereof, although it was at the same time paying interest on stock registered on Australian registers in Australian currency at the same rate on the same face value. It continued so to do until the commencement of the winding up.

Until the year 1942 the bank drew up all its balance sheets on the basis that the English £ and the Australian £ were interchangeable at par, but in the year 1942, pursuant to an order made by the Treasurer of the Commonwealth of Australia in the exercise of powers conferred on him by the National Security (War-Time Banking Control) Regulations, it converted for purposes of its balance sheets its indebtedness in respect of stock inscribed on the English register into Australian £s at the then current rate of exchange.

In the year 1947 the appellant became the holder, either in its own name or in the name of its nominees, of all of the shares in the bank, and thereafter the bank was placed into voluntary liquidation by resolution passed on October 30, 1947. As a result of the liquidation of the bank the principal moneys secured by

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the stock became payable and the liquidator was faced with the question as to the amounts in Australian £s for which he should admit proofs in such liquidation in respect of such principal moneys. He issued a summons in the Supreme Court of Queensland on December 21, 1948, for the determination of this question.

At the date of the commencement of the winding up of the bank there existed the following classes of stockholders:—

(i) Those whose stock was at that date registered on the London register and had been at all times so registered; (ii) those whose stock was at that date registered on the London register but which had been transferred thereto from an Australian register; (iii) those whose stock was at that date registered on an Australian register and had been at all times so registered; (iv) those whose stock was at that date registered on an Australian register, but which had been transferred thereto from the London register; (v) those whose stock was at that date and at the date of issue thereof registered on the London register, but which had at an intermediate period been registered on an Australian register; and (vi) those whose stock was at that date and at the date of issue thereof registered on an Australian register, but which had at an intermediate period been registered on the London register.

The Supreme Court of Queensland made representation orders under which class (i) was to be represented by the first respondent, the Scottish Union and National Insurance Co.; class (ii) by the second respondent, the National Mutual Life Association of Australasia Ltd.; and classes (iii) and (iv) were to be represented by one Edward Robert Crouch. No representation orders were made as regards class (v) or class (vi), but at the hearing of the motion below mentioned argument was addressed on behalf of class (v) by the second respondent and on behalf of class (vi) by Mr. Crouch.

On December 24, 1948, the liquidator gave notice of motion raising with greater particularity the points to be decided on the summons. The notice of motion contained questions framed so as to cover every possible alternative. It was not necessary to set the questions out in full. In substance they all raised the same point, namely, whether a unit of the stock gave different rights to the holder when such unit was redeemed according to the place where the unit was registered either (a) at the date of issue of the stock or (b) at the date of commencement of the winding up.

Macrossan C.J., in the Supreme Court of Queensland, held that the place of registration at the date of original issue of the stock was the governing factor, and that accordingly the liquidator must admit proofs on the footing that the bank's obligations in respect of stock originally registered in London were obligations in English currency, that its obligations in respect of stock originally registered in Australia were obligations in Australian currency, and that no regard was to be had to any subsequent change of registration. He directed that the equivalent in Australian currency of the face value of principal and interest payable in English currency be ascertained as at the date of the commencement of the winding up.

From that order the appellant appealed to the High Court of Australia, contending that the obligation of the bank in respect of all the stock was an obligation to pay Australian currency without regard to the place of registration. The second respondent entered a cross-notice of appeal contending that the critical date in determining liability of the bank was the date of liquidation and not the date of the original issue of the stock. Mr. Crouch did not appear on the hearing of that appeal; nor had he taken any part in the proceedings before this Board.

The High Court (Dixon, Williams, Webb and Fullagar JJ., Latham C.J. dissenting) allowed the cross-appeal and in view of their conclusion on the cross-appeal directed a further variation of the order of the Supreme Court to give effect to their opinion that the material matter in deciding whether the obligation sounded in English pounds or Australian pounds was the place of registration at the date of commencement of the winding up and not the place of registration at the date of issue of the stock. Subject to that variation the High Court dismissed the appellant's appeal. Latham C.J. would have allowed the appeal and would have dismissed the cross-appeal, being of opinion that the obligations of the bank in respect of the stock sounded only in Australian currency irrespective of the place of registration. It was from that decision of the High Court that the present appeal was brought.

1952. May 12, 13, 14, 15, 19, 20 and 21. *G. E. Barwick Q.C.* and *G. A. G. Lucas* (both of the Australian Bar) for the appellant bank. The liquidator does not take any part in this appeal, although he appeared in the court below. The question is as to the currency in which the obligation to pay the interminable inscribed deposit stock is to be met. The stock was

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interminable, there being no obligation to pay it except on default in payment of interest or on liquidation. The value of the Australian and the English pound diverged some years ago, so that if the respondents be right, and the substance of the obligation to pay that stock is to be measured in English pounds, it would be admissible to prove A£125 for each £100 face value of the stock. If, on the contrary, the appellant be right, and the obligation is always to be measured in Australian pounds, then the stock would be admissible in proof at A£100 for each £100 stock. [Counsel then referred to the facts leading up to the creation of the stock, and to the schemes of arrangement, and continued:] The scheme of 1897 must be looked at for the rights of the parties. The proper law of the contract must be found, and having found it, *prima facie* these currency expressions in the document will be referring to the currency of the place of the proper law. The power of changing registration destroys any inference that might otherwise be drawn from the place of registration or from the place of payment. Latham C.J. was right when he said that everything depended on the facts. It is a question of construction, and, looking at this matter from the point of view of construction, discharge of the obligation in Australian pounds only is intended, irrespective of the place of registration.

The submissions for the appellant are: (1) At the relevant time, whether it be that of the making of the order sanctioning the scheme by the Queensland court, or of the allocation of the stock or of the issue of the certificate of registration of the stock, the monetary system of Queensland was in contemplation of law distinct and separate from the monetary system of England: *Bonython v. Commonwealth of Australia*.¹ (2) Therefore, the word "pound" in 1897 did not adequately describe the unit of payment, that is to say, it had to be assigned some further description. (3) No court or person concerned with the scheme of arrangement in 1897 was conscious of the fact that there were separate monetary systems in operation, and therefore no court or person contemplated or thought possible any divergence in the value of the units of the currencies: *Bonython's case*.² (4) The question now is, for how many pounds Australian will each £100 of stock of stockholders be admitted to prove in the Queensland liquidation? That, ultimately, is the precise question. (5) The stockholders' right to prove, as, indeed, all the rights on the

¹ [1951] A.C. 201, 217.² *Ibid.* 219.

stock, are exclusively derived from an order of the Queensland court sanctioning the scheme of arrangement. That right is not contractual; it comes from the order: *In re Garner's Motors Ltd.*³; *In re Oceanic Steam Navigation Co. Ltd.*⁴ (6) The question is therefore to be determined by the construction of the scheme as sanctioned; and in particular by assigning a meaning to the word or symbol "pound" (*Bonython's case*⁵); that is a clear authority that this is a question of the construction of the scheme. (7) The proper law of the order of the court and that of the scheme and all the documents implementing it is that of Queensland. (8) The relevant rules of construction, therefore, are (a) *prima facie*, currency expressions in an order of the Queensland court refer to the Queensland monetary system; and (b) words and expressions in the document *prima facie* should bear the same meaning throughout. As to (a), see *Bonython's case*,⁶ and also Mann on the Legal Aspects of Money, pp. 165 and 179. (9) There is nothing in the document to displace the presumption that *prima facie* the rule of construction is that the money of account will be the money of the place of the order. (10) Quite independently of any presumption, on the construction of the instrument as a whole, its currency expressions refer to one monetary system, that of Queensland.

Further, the question is not one of imputing intention: *Goldsbrough, Mort & Co. Ltd. v. Hall*.⁷ If they did not know that there were two monetary systems, what significance would the registers have had? And if they did know, or were supposed to have known, of the two currencies, no inference can be drawn from the registers. The money of the place of payment will govern the measure of the obligation where on construction of the instrument the place of payment has been chosen as indicating the money of account. This involves that not merely by construction a place of payment can be assigned, but that the nominated place of payment has significance. This is a liquidator's, not the bank's, obligation, and it must be paid where the liquidator is—he must pay it. This being interminable stock, at no time before the liquidation was the bank under any obligation to pay this stock, so there was then no place of payment. It does not, then, necessarily follow that the place of payment is the place of registration. What is being looked for is the place of payment stipulated as significant. The place of registration had

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³ [1937] Ch. 594.⁶ *Ibid.* 222–223.⁴ [1939] Ch. 41, 47.⁷ [1948] V.L.R. 145, 152–157;
(1949) 78 C.L.R. 1.⁵ [1951] A.C. 201, 219.

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no significance in the determination of the money of account by which the obligation to any holder of stock should be measured. On the proper construction of the new scheme and the orders approving it, the word "pound" and the symbol "£" referred throughout to the currency of Queensland. The word "pound" had the same meaning in the various certificates of registration as it had in the new scheme, and likewise referred to the currency of Queensland.

D. I. Menzies Q.C. (of the Australian Bar), *Gahan Q.C.* and *Godfrey Le Quesne* for the respondents. The document must be considered in its historical setting, and no express reference being made therein to "pounds" of any particular character it must, as was said in *Bonython's* case,⁸ be a matter of implication to be derived from all the circumstances of the transaction, whether or not English pounds or Queensland pounds are referred to; and whether or not an implication is to be made is part of the construction of any document. All the creditors then or thereafter within the jurisdiction of the New South Wales court are bound by the order of the New South Wales court sanctioning the scheme. The Queensland court's order did not affect New South Wales creditors, but it bound Queensland and assenting English creditors, and did so both in Queensland and in England. The English order bound in England those creditors not already bound by the Queensland order. Starting from that, each order sanctioning the scheme, whether of the court of Queensland, New South Wales or England, must have the same meaning, and no doubt that would be so whatever happened to be the chronological order of its making. If that be so, the order and the scheme cannot take its character from the law which any particular court was administering in sanctioning it, and in particular it cannot by reason of the fact that it was made by a particular court refer to the money of the place of that court.

That throws one back to the scheme itself without any aid from the fact that it was sanctioned by any particular court. If that be right, it provides a complete answer at the outset to the submission for the appellant that the right to prove, as indeed all rights from the stock, are exclusively derived from the order of the Queensland court sanctioning the scheme of arrangement. That cannot be right, because the New South Wales creditors were not affected by the order at all; they were already bound by virtue of the order of the New South Wales court. It also

⁸ [1951] A.C. 201.

provides a complete answer to the appellant's proposition that the proper law of the order of the court and therefore of the scheme and all the documents implementing it was that of Queensland. That, too, cannot be right. It is likewise an answer to the submission for the appellant that the relevant rules of construction are *prima facie* that the currency expressions in the order of the Queensland court refer to the Queensland monetary system.

The result, therefore, is that one is thrown back to the transaction itself, which has to be construed without any aid from the fact that an order was made in any particular court. The problem is not so much that in *Bonython's* case,⁸ but it is more like construing, for instance, an agreement which has been given statutory force and effect by Acts of Parliament in three countries. Unquestionably in each case the arrangement will mean the same whichever way it is looked at. Therefore the fact that this document obtained binding force by virtue of orders of the court is of no significance whatever in affecting its construction, and that, it is submitted, corresponds with the realities of the situation.

The principles of construction to be applied to this scheme are exactly the same as if this were a contract, and it has to be construed according to the proper law. In a case of ambiguity, how the parties have both acted on a document does assist in showing their intention: *Watcham v. Attorney-General of the East Africa Protectorate*⁹; *Ottoman Bank of Nicosia v. Dascalopoulos*¹⁰; *North Eastern Ry. Co. v. Lord Hastings*.¹¹ Here we are concerned to find out what the bank intended. The contention of the appellant is that all this stock at all times sounds in Australian currency. The bank's conduct is not immaterial, and the matter can be tested to some extent by whether the result is fair or completely unfair, and as an illustration, if the appellant be right an English investor on the English register would get back only £80 for every £100. It is submitted that this money is payable in the currency of the place of registration at the time of the liquidation. Alternatively, if that be not so, nevertheless a stockholder who took stock on the English register in 1897 and continued on that register up to the date of the liquidation is at least entitled to payment in English currency, and reliance is placed not merely on the place of registration, but the place of registration at the date of the issue of the stock.

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⁸ [1951] A.C. 201.⁹ [1919] A.C. 533, 537.¹⁰ [1934] A.C. 354, 360.¹¹ [1900] A.C. 260, 270.

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This Board did not decide in *Bonython's* case¹² that in 1895 there were two moneys of account, one Queensland and one English. The old scheme contains references which are clearly referring to Australian money of account if there were two separate currencies at the time, but the old scheme leaves English liabilities as English liabilities sounding in English money. So when the old scheme refers to "pounds" it is properly to be construed as English or Australian pounds as the case may be. Turning to the new scheme, it is not contended that there are no references in this scheme to pounds as Australian pounds, nor that in this scheme is there any reference to "pound" or the symbol "£" which must of necessity refer to English money to the exclusion of Australian money, but rather that in a particular case the proper interpretation of the document is that the word "pound" or the symbol "£" may refer either to English money or Australian money, and that it depends on the circumstances to which it refers in a particular case. It is not taken further than that.

If there is to be a conversion from one currency into another it should be possible to point to the words which effect that change. It should not be assumed that it happened, rather the presumption is the other way. The natural meaning of the words does not require that. Those on the Australian registers were clearly to receive Australian money, and those of the English register English money. Where the place of payment is England it means English currency, and where Australia, Australian currency. Interest on stock inscribed in England was at all times paid in English currency. There are thus a number of places where a reference to a sum of money is not a reference to Australian money exclusively, it is a reference to English or Australian as the case may be, and that destroys the argument for the appellant that wherever in this scheme a reference to "pound" or a sum of money is found, that must be Australian money. Interest and redemption money was properly payable at the place where the stock was registered, and the amount of money to be paid is to be measured according to the face value of the currency of the place of payment. There is no established rule of law to that effect, but there is a presumption that that is so, but it can be departed from if countervailing circumstances can be found. The money of account is the same money as the money of the place of payment. The presumption as stated in

¹² [1951] A.C. 201.

Broken Hill Proprietary Co. Ltd. v. Latham ¹³ has been generally accepted and has the approval of the House of Lords and of the Privy Council.

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The power of transfer is not given with a view to transfer from one currency to another, but of obtaining registration on a more convenient register. It is conceded that in the course of time and at different periods the payment of one lot of stock may sound in English currency and at another time in Australian currency. Courts of the highest authority have in some circumstances construed an obligation as being in English currency and the same obligation in other circumstances as being in Australian currency: the *Broken Hill Proprietary* case,¹³ to which considerable importance is attached; the decision was that those who exercised their option to be paid in London were entitled to be paid in English currency without any provision for exchange. There is no difficulty in an appropriate case in taking two instruments, each of which is expressed in exactly the same language, and saying that in the circumstances one requires payment in Australian currency and the other in English currency. In *Adelaide Electric Supply Co. v. Prudential Assurance Co.*¹⁴ Lord Wright thought that the proper rule was that which was applied by Maugham J. in the *Broken Hill Proprietary* case,¹⁵ and looked to the currency of the place of payment. What Lord Wright said is in line with what was said in *Bonython's* case.¹⁶

It is submitted next that in 1897 there was money of account common to England and to Queensland. If there were but one pound at that date then, of course, the scheme of arrangement could not effect any conversion; there was nothing to convert, for the pound in England and in Queensland was one and the same thing. If this submission be correct, it destroys the whole basis of the appellant's case, namely, that there were separate and distinct moneys of account in 1897, and that it was possible to refer to a Queensland pound as something distinct from an English pound. If *Bonython's* case ¹⁶ is a decision that there was at no time a common money of account, it is departing from previous decisions of the House of Lords, the Privy Council, and of a number of judgments of the High Court, and doing so without saying that they were wrong. The current of authority is that in 1897 there was not a Queensland pound; there was a

¹³ [1933] Ch. 373, 391.¹⁵ [1933] Ch. 373.¹⁴ [1934] A.C. 122, 159-60.¹⁶ [1951] A.C. 201.

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“pound.” In *Auckland Corporation v. Alliance Assurance Co.*¹⁷ the Privy Council thought that the presumption regarding the place of payment was sufficient—that there were no counter-vailing circumstances. The position is far stronger here than if there was a bare option to be paid in A or B. In 1897 the pound in Queensland was a pound by virtue of the legislation of the Imperial Parliament, and was one and the same thing as the pound in this country. In the absence of anything in the contract expressly to the contrary, the place of payment determines the currency in which the obligation sounds: *De Bueger v. J. Ballantyne & Co.*¹⁸

Gahan Q.C. followed.

Barwick Q.C. in reply. There was only one class of stock and a common obligation. There is nothing in the scheme which supports the contention for the respondents that if the pounds have to be paid in England they have to be paid in English pounds, and if in Australia in Australian pounds. The problem is one of construction, and there is no presumption that the place of payment assists to measure the extent of the obligation; that is a case of last resort. The Board put this idea of the place of payment into its proper position in the *Bonython* case¹⁹; see also Mann on The Legal Aspects of Money, pp. 165–6, and *Bonython's* case before the High Court of Australia.²⁰

July 10. The judgment of their Lordships was delivered by LORD COHEN, who stated the facts set out above and continued:—Their Lordships agree with Latham C.J. that the question to be determined is not, strictly speaking, the construction of a contract, though the consent of three-quarters of the creditors concerned was needed before the scheme could be sanctioned. It is a question of construction of the words creating the stock. No doubt the document setting out the terms of the scheme must be looked at as a whole and in the light of relevant surrounding circumstances, but the real question to be decided is as to the nature and incidence of the stock.

In their Lordships' opinion the salient feature of the new scheme was that under clause 3 the bank was to create and allot a new stock and that the registered holders of the then existing securities were to accept the new stock in satisfaction and discharge of such securities. These securities arose from deposits

¹⁷ [1937] A.C. 587.

¹⁸ [1938] A.C. 452.

¹⁹ [1951] A.C. 201, 219.

²⁰ (1948) 75 C.L.R. 589, 622–3.

made some in London and some in Australia, and no doubt the London depositors became entitled by virtue of such deposits to be repaid in London pounds while the Australian depositors were entitled to be repaid in Queensland pounds or New South Wales pounds. The distinction between Queensland pounds and New South Wales pounds ceased to be material and their Lordships will therefore on occasion refer to them both as Australian pounds. Their Lordships will assume that the rights of the depositors were unchanged in the respect above-stated by the old scheme. But once the new scheme came into force, and they received stock to the amount of 75 per cent. of the pounds previously owing, it does not at all follow that the stock they received was not composed of units which were interchangeable in nature. If the new scheme had provided that instead of receiving in exchange parcels of the stock quantified in pounds, the depositors were to receive parcels of something else, e.g., Port of London stock, there would be no doubt that each unit of what they received was in every respect the equivalent of every other unit, and since the English £ and the Australian £ were not in 1897 in fact different in value, there would be nothing surprising in the depositors getting in substitution for their old rights something each unit of which was the same as every other. The whole question is whether the stock was of this uniform nature or not.

The language of clauses 3 and 4, which deals with the creation and allotment of the stock, seems better adapted to describe stock of a uniform nature than to describe stock with the peculiar rights recognized by the order of the High Court. Moreover, the very use of the word stock itself connotes uniformity. "Debenture stock," as pointed out in *Lindley on Companies*, 6th ed., p. 346, "is merely borrowed capital consolidated into one mass for the sake of convenience. Instead of each lender having a separate bond or mortgage, he has a certificate entitling him to a certain sum, being a portion of one large loan." But the feature of the stock which is most significant is the fact that the holder of it was given the right to transfer from one register to another just as he might please. The original depositors had no such right, nor were they given any such right by the old scheme. It was the circumstance that their deposits had been made at a definite place and were repayable there, and only there, which is the strong reason for saying that under the old scheme they were entitled to be repaid the face value of the deposit receipts or other security which they held in the currency of the place of registration. But inasmuch as the interminable inscribed deposit stock

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which was substituted for the old securities could be moved about from register to register as the holders pleased, this is a new feature which their Lordships consider goes far to establish that the stock did not give the various holders thereof a different right of repayment according to where it might for the time being be registered.

There are other features in the new scheme which support the view that on its proper interpretation the stock when redeemable is redeemable in Queensland pounds wherever it might happen for the time being to be or to have been registered. It was created by a Queensland bank. While the new scheme was sanctioned by three different courts, a study of the new scheme, which was in identical language before all three courts, shows quite clearly that the order of the Queensland court is regarded as the governing order. Certificates of the stock, wherever registered, were in the same form and certify that the holder owns the number of units of the stock therein stated which was created pursuant to the provisions of the scheme sanctioned by the Supreme Court of Queensland. The scheme defines the "court" as meaning the Supreme Court of Queensland when, for instance, it requires the bank to effect the necessary alterations of its articles as soon as practicable after the scheme has been finally sanctioned by the court. The power to appoint directors is made dependent on £500,000 of stock being unredeemed, and, as that right is to become effective when proper provisions have been made in articles of association in the other provisions of which a reference to a pound is clearly a reference to an Australian pound, the natural inference is that by £500,000 is meant 500,000 Australian pounds. The same observation may properly be made in relation to the voting rights of the stockholders at meetings of the bank, for which provision also has to be made in the articles of association.

There are no doubt places where the symbol £ must mean £ English or £ Queensland as the case may be. This is plainly the case where the new scheme directs fractions of £1 to be paid in cash and to be disregarded in calculating the amount of stock to be created. It may be that the same is true in the clauses in the schedule dealing with the fee to be paid for the registration of a transfer and the issue of a fresh stock certificate in the place of one lost, defaced or destroyed, but these minor provisions cannot displace the inference which their Lordships would draw from the more important clauses to which they have already referred.

Looking at the scheme as a whole, their Lordships agree with Latham C.J. that the liability of the bank in respect of the stock is for a fixed amount in Australian pounds and that the bank's liability—the stock—is and always has been limited to paying to each registered holder, on the occurrence of an event making the principal moneys payable, Queensland pounds equal to the nominal value of the stock held by him, and in the meantime to paying in Queensland pounds interest on the said principal moneys at the rate of $3\frac{1}{2}$ per cent. per annum.

The majority in the High Court did not all base their conclusions on the same line of reasoning, but two main points seem to have influenced their decision: (1) the history of the liabilities which were dealt with by the scheme, and (2) the fact that as they interpreted the scheme the interest and principal moneys were payable at the place of registration.

Their Lordships have already dealt with the first point. In their opinion the majority in the High Court did not give sufficient weight to the fact that one stock was being issued in place of the pre-existing liabilities, or to the radical difference between the new scheme and the old scheme resulting from the fact that under the new scheme stock could be moved from register to register at the will of the holders.

As regards the second point, it is to be observed that in view of the right to transfer from register to register the facts are essentially different from those which existed in *Adelaide Electric Supply Co. v. Prudential Assurance Co.*,²¹ where the dividends were payable only in Australia. The present case is more like *Auckland Corporation v. Alliance Assurance Co.*²² and *Bonython v. Commonwealth of Australia*,²³ in both of which cases there was an option in the debenture holder to demand payment in England, or in New Zealand or Australia, as the case might be. Referring to such a provision both Dixon and Fullagar JJ. in the present case point out that "great care," to quote Dixon J., "must be exercised in using the place of payment as a consideration supporting an inference that the substance of the obligation "is to be measured in the money of the same place." It may still be possible to draw the inference (see *Auckland Corporation v. Alliance Assurance Co.*²⁴), but as appears from the observations of Lord Simonds in *Bonython's* case,²⁵ that case must be regarded as a very special decision on the facts of the particular case. In

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²¹ [1934] A.C. 122.²⁴ [1937] A.C. 587.²² [1937] A.C. 587.²⁵ [1951] A.C. 201, 221.²³ [1951] A.C. 201.

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the present case, for the reasons already indicated, their Lordships think that the caution which Dixon and Fullagar JJ. administered to themselves should have led them to the opposite conclusion to that which they in fact reached.

Mr. Menzies, for the respondents, invited their Lordships to treat the case as one in which there was in 1897 the same money of account in England and Queensland. He based his argument on some obiter dicta of certain of their Lordships in the *Adelaide* case,²⁶ and on some observations of Lord Simonds in *Bonython's* case, where Lord Simonds, delivering the judgment of the Board, said ²⁷: "though there were in a real sense two monetary systems, "the money of account was the same and the money of payment "substantially the same in the two countries."

These observations lend some colour to Mr. Menzies' argument, but their Lordships think that, reading the judgment as a whole, the Board was expressing the view, which their Lordships believe to be correct, that if, as the Board found to be the case in *Bonython's* case,²⁷ there were in 1897 different monetary systems in England and Queensland, it necessarily follows that there were different moneys of account. They may, as indeed they did both in *Bonython's* case²⁷ and the present case, bear the same denomination and have the same value at the date of issue of the security under consideration, but they were none the less potentially different. That this was the view of the Board is, their Lordships think, made clear by certain observations, which read as follows²⁸: "It appears to their Lordships that in the "consideration of this question too much emphasis should not "be laid on the fact that the money of account of Queensland "and England was the same in 1895. It was undoubtedly similar "at that date, and before and after that date, in the sense that "the same nomenclature, pounds, shillings and pence, was used "to describe its units of value. . . .

"Leaving aside the vital distinction between the two monetary "systems in that they depend on different law-making powers, "their Lordships think that the identity (or, as it were better "said to avoid confusion, the similarity) of the two systems can "be over-stressed. For, while it is true enough, as already "stated, that the money of account, in the sense of the denomina- "tion of the units of account, was the same in New South Wales "and in England, yet the money of payment, by which the

²⁶ [1934] A.C. 122.²⁸ Ibid. 217, 218.²⁷ [1951] A.C. 201, 219.

" obligation to pay so many units of the money of account could
 " be discharged, was by no means immutable."

Dixon J. says in the course of his judgment in the present case: " By the registers the stockholders of each jurisdiction were
 " identified and recorded. But it was seen that it might be
 " convenient for individual stockholders to change from one juris-
 " diction to another and it was thought not to matter, because
 " no one foresaw that during the currency of the stock Great
 " Britain and Australia would leave the gold standard and the
 " monetary systems would widely diverge." From that expres-
 sion of opinion their Lordships do not differ, but if that be the
 state of the parties' minds it would equally seem to explain why
 they thought no one would have a cause of complaint if a uniform
 stock was issued to all the creditors irrespective of whether their
 debts had hitherto been payable in Australia or London. If,
 contrary to their Lordships' opinion, the parties could be taken
 to have contemplated the possibility of divergence, it might well
 be that the bank, who were a party to the scheme, would have
 insisted on having uniform stock in order that their liability might
 not be for an uncertain amount. This is not, however, a permis-
 sible field of speculation.

Mr. Menzies placed some reliance on the facts that (a) interest
 on the stock which was for the time being on the English register
 had always been paid in English currency at the rate of $3\frac{1}{2}$ per
 cent. per annum on the face value of the stock, and (b) when in
 the year 1942 the Treasurer of the Commonwealth of Australia
 made an order under the National Security (War-Time Banking
 Control) Regulations the bank converted for balance-sheet purposes
 its indebtedness in respect of stock inscribed on the English
 register into Australian pounds at the current rate of exchange.

Their Lordships are unable to attach weight to these facts.
 They find themselves on this point in complete agreement with
 Macrossan C.J., who said: " In my view the conduct of the bank
 " in relation to neither of these matters is of any assistance in
 " construing the scheme of arrangement. First, as to interest,
 " clause 4 of the scheme provided that interest on the stock should
 " be payable half-yearly at the respective offices of the bank at
 " which the stock was registered. The clause is silent as to the
 " money of account applicable for the obvious reason that at the
 " time when the scheme of arrangement was made there was
 " only one money of account in all the places where the bank had
 " registers of stock, and no one contemplated that in the future
 " there might be more than one relevant money of account.

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“ Until 1926 the currencies of England and Australia were substantially of equal value. Therefore, for 29 years at least there was no occasion for the bank to direct its attention to the possible difference in its obligation to different classes of holders of stock in relation to this matter which might be caused by one or other construction of the contract. Its subsequent conduct after that lapse of time in paying interest on the basis that one of the several possible constructions of the contract was the correct one cannot, in my view, be called in aid to determine the true construction of a contract made in 1897. For the same reason, and a fortiori, the bank’s method of presentation in its accounts of its liability in respect of stock registered in London, applied for the first time in 1942, cannot affect the construction of the scheme of arrangement made in 1897, 45 years earlier. It shows no more than an opinion held by the responsible officers of the bank in 1942 on the matter of the construction of the scheme of arrangement.”

As their Lordships have already said, the matter is purely one of construction and for the reasons already given their Lordships find themselves in agreement with the conclusion of Latham C.J.

Mr. Barwick, for the appellant, invited their Lordships, if they came to this conclusion, not to allow the second defendants any costs in the High Court or before this Board, basing his contention on the argument that their Lordships had come to the conclusion that the cross-appeal ought to have failed in the High Court and the second respondents ought to be penalized for having given the notice of cross-appeal. The second respondents were made representative defendants and had been brought before the High Court by the appellant to defend a judgment in their favour. In these circumstances their Lordships are not disposed to accept Mr. Barwick’s argument on costs.

Their Lordships will therefore humbly advise Her Majesty to set aside the order of the High Court except as regards costs, and to vary the order of the Supreme Court of Queensland (a) by substituting the word “ Australian ” for the word “ English ” wherever such last-mentioned word occurs in the answers to questions 1, 4 and 6; (b) by deleting the answer to question 7 and substituting therefor the words “ unnecessary to answer.”

The costs of all parties of the appeal to this Board must be taxed and paid by the respondent liquidator out of the assets of the bank.

Solicitors: *Markby, Stewart & Wadesons; Parker, Garrett & Co.*

[HOUSE OF LORDS.]

H. L. (Sc.)*

PARVIN APPELLANT;

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AND

MORTON MACHINE CO. LD. RESPONDENTS.

Factory—Dangerous machinery—Fencing—Machinery manufactured for sale—Not part of factory equipment—Workman injured while cleaning it—Whether obligation to fence—Factories Act, 1937 (1 Edw. 8 & 1 Geo. 6, c. 67), ss. 14 (1), 16, 20.

The provisions of sections 14 (1), 16 and 20 of the Factories Act, 1937 (dealing with the fencing of machinery and the cleaning of it by women and young persons) do not apply to machines or machinery manufactured in a factory and not forming part of its equipment used in its manufacturing processes.

Decision of the Second Division of the Court of Session 1950 S.C. 371 affirmed.

APPEAL from the First Division of the Court of Session.

The facts averred were summarized by Lord Normand as follows:—The appellant, a minor employed by the respondents as an apprentice fitter, was instructed by one of the journeymen fitters to clean a dough-brake which had been manufactured and assembled in the respondents' factory. The dough-brake consisted of a flat table 6 feet long and 22 inches wide divided into two equal parts by a pair of rollers, each of them 22 inches wide. One roller was placed with its upper surface flush with the table surface, and the other was mounted directly above it at a height which could be adjusted according to the required thickness of the dough which was passed between the rollers while they were revolving. The rollers were driven at a speed of 40 revolutions a minute by an electric motor built in under the table. A guard was provided which was so designed that it could come down on the side of the rollers where the nip-in might happen to be according to the direction of the rotation of the rollers. Before the appellant began to clean the dough-brake the fitter had removed the guard in order to adjust it and had set the brake in motion. While the appellant was working, a rag held by him was drawn between the rollers and after it his hand and forearm. He sued both on negligence at common law and on breach of the

* *Present*: LORD NORMAND, LORD REID, LORD TUCKER, LORD ASQUITH OF BISHOPSTONE and LORD COHEN.

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duties imposed by sections 14 (1), 16 and 20 of the Factories Act, 1937. His averments of negligence were held to be relevant by the Lord Ordinary and issues were approved. The respondents did not reclaim against that part of the Lord Ordinary's interlocutor. On the other hand, the Lord Ordinary held the averments of breach of statutory duty irrelevant, and he therefore repelled the appellant's plea-in-law directed to them and sustained quoad them the respondents' plea to relevance. The appellant reclaimed against this part of the interlocutor and the Second Division of the Court of Session unanimously refused the reclaiming motion and adhered.

The appellant appealed to the House of Lords.

Beney K.C. (of the English Bar) and *John Wilson* (of the Scottish Bar) for the appellant. The workman has relevantly averred that he was injured through the employers' breach of sections 14 (1), 16 and 20 of the Factories Act, 1937, and he is therefore entitled to trial of that part of his case by a jury. The question arises on the construction of some of the words of those sections. It is to be noted that the dough-brake comes within the Dangerous Machines (Training of Young Persons) Order, 1933 (S.R. & O. 1933, No. 485).

In construing a statutory provision ordinary words are to be read in their ordinary, natural, popular and grammatical meaning, and qualifying words should not be read in. There must be some ambiguity before words can be given any meaning other than their plain meaning. Words which are apparently plain cannot be made ambiguous by the exercise of legal ingenuity. As to the rules of construction, see *Grey v. Pearson*¹; *Victoria City Corporation v. Bishop of Vancouver Island*²; *Vacher & Son Ltd. v. London Society of Compositors*³; *Magor and St. Mellons Rural District Council v. Newport Corporation*.⁴ The plain meaning must prevail likewise in construing a statute which is remedial or penal: see *London & North Eastern Railway Co. v. Berriman*⁵ and *Harrison v. National Coal Board*.⁶ In the language of the Act of 1937 there was no manifest ambiguity and no warrant for implying a limit to the ambit of the words used so as to produce uniformity with other parts of the statute.

The provisions of the Act of 1937 apply to all machinery and

¹ (1857) 6 H.L.C. 61, 85-6.

² [1921] 2 A.C. 384, 387.

³ [1913] A.C. 107, 117-8.

⁴ Ante, 189, 190, 191-2.

⁵ [1946] A.C. 278, 295, 300-1, 312-3.

⁶ [1951] A.C. 639, 650.

machines in a factory and not simply to those which form part of the plant for the purposes of manufacture. In construing the relevant sections one may compare the general words used in them and the more particular forms used in section 10 (1) (c) of the Factory and Workshop Act, 1901, where the words "any machinery" introduced by the Act of 1937 are not found. When one finds a repealed Act and a new Act in *pari materia* substituted for it one is entitled to look at the old Act in construing the new one: see *In re Copeland*.⁷ In the present case, the comparison supports the view that the wider of the two constructions contended for should prevail.

In the sections relied on by the workman the widest possible words are used. Thus section 14 (1) refers to "every dangerous part of any machinery other than prime movers and transmission machinery." The workman while employed and working in the factory according to instructions was injured by a dangerous unfenced part of a machine there, that part being neither a prime mover nor transmission machinery. The words "any machine" are used in section 20, and he was a young person cleaning a machine within the meaning of that section. "Machinery" and "machine" are interchangeable terms. If it had been intended to limit the words so as to exclude machinery such as this, which was being tested, it would have been easy for the legislature to say so instead of using the word "any." The facts come within the plain language of the relevant sections. By section 14 (1) the rollers should have been fenced. By section 16 the fence should have been kept in position. By section 20 the workman, as a young person, should not have been set to clean the machine. On their literal meaning the words apply to the dough-brake.

Even if the words of the Act are held to be ambiguous, the workman's construction should still be accepted. The purpose of the Act, particularly Part II, which contains the sections in question, is to provide for the safety of persons working in factories and the construction which will promote that purpose should be adopted: see *Chalmers v. Speedwell Wire Co. Ltd.*,⁸ which is not distinguishable, and *Thurogood v. Van den Berghs & Jurgens Ltd.*⁹

From section 14 (1) it appears that the provisions in question were designed to protect "every person employed or working on

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⁷ (1852) 2 De G.M. & G. 914, 920.⁹ [1951] 2 K.B. 537, 545.⁸ 1942 S.C. (J.) 42, 47.

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“the premises,” not merely operators of machines. Section 16 requires fencing while the parts in question “are in motion or “in use,” which words cover movement, whether it be part of the operation of the machine or for such purposes as inspection, testing or cleaning. The duties imposed by the Act are not limited to the case of “operation.” In section 20 the reference is not to “operation” but to “motion.” This machine could only come within the provisions of section 14 when it was substantially completed. It is hard to visualize a process of manufacturing such machines in the course of which parts would be set in motion before it was completed. A sharp knife or a saw, which in position would be part of the machine, might be dangerous if lying apart from it, but would not itself be a machine requiring fencing. It can be a question of degree when such an object becomes part of the machine. Further, it is not conceded that because a machine is out of repair it necessarily ceases to be a machine which requires fencing.

In the present case, on the true construction of the relevant sections, the employers were guilty of a breach of statutory duty whereby the workman was injured.

The decision in *Slack v. A. & J. Inglis Ltd.*¹⁰ was wrong and ill-founded.

[They also referred to sections 101, 130, 131, 149 and 151 (1) of the Act of 1937.]

Calver K.C. and *Sloan* (both of the Scottish Bar) for the respondent company. The interlocutor appealed against is well-founded and should be affirmed because there was no breach of statutory duty. Sections 14, 16 and 20 can never apply to articles which are being manufactured, and therefore it does not matter what stage the manufacture has reached. To hold that at some stage of manufacture an article becomes a machine for the purposes of these sections would raise some extraordinary difficulties for manufacturers and inflict such grave hardship on them that the court would so decide only if it were impossible to escape from that result, especially as the Act is penal. In any event, before an article can be said to be a machine all the things necessary to make it fit for its intended use must have been completed. If a machine is in such a condition that it still needs cleaning and adjustment before it comes into use it cannot yet be a completed machine.

The House should approve *Slack v. A. & J. Inglis Ltd.*¹⁰

¹⁰ (1947) unrep. Cited in Appendix to Printed Case, p. 31.

*Thurogood v. Van den Berghs & Jurgens Ltd.*¹¹ is distinguishable and does not turn on the same point as the present case.

The scheme of the Act is to deal with (1) machinery, (2) plant, and (3) the safety of workpeople so far as the construction of the building is concerned. The sections in question are in Part II of the Act headed "Safety (General Provisions)," the whole tenor of which indicates that it is concerned only with machinery and machines comprising the plant and equipment of the factory, whereas the dough-brake was not part of the equipment. Sections 12 and 13 clearly refer to the plant and equipment of a factory (e.g., section 13 (2), "every part of the transmission "machinery"). Section 14 deals with machinery other than that specifically provided for in sections 12 and 13 but falling within the same category. "Any machinery" in section 14 (1) means any machinery ejusdem generis in relation to what has been dealt with before. The provisions could not be applicable to plant in the course of manufacture since some degree of permanency is contemplated. It is to be noted that section 14 (3) is one of the few instances in the Act where the product is treated as being dangerous; it would be unnecessary if section 14 (1) had the meaning contended for on behalf of the workman. (The "stock bar" referred to is the product which is being handled, the raw material.) Testing a machine is not user.

[They referred to sections 22, 29 and 60 (1) of the Act.]

Beney K.C. in reply. It is frequently a matter of doubt when the words of a statute are fulfilled by the facts of any particular case, and if there are difficulties in deciding when a machine has come into being they must be faced. But in general the ordinary occupier of a factory would know when any machine he was manufacturing had reached the stage when it could be called a completed machine. It is to be noted that a machine after use will need cleaning and adjustment without ceasing to be a machine. As to sections 12, 13 and 14, in their construction something is to be derived from the contrast in the language of section 14, and it is not right to put on it the limitations suggestion because of sections 12 and 13. The dough-brake is a machine and is productive of the same perils as if it had been set up in the factory for which it was intended. The matter should be approached from the point of view of the perils with which the Act was concerned. The Act was meant to achieve 100 per cent. safety.

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¹¹ [1951] 2 K.B. 537.

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Their Lordships took time for consideration.

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March 6. LORD NORMAND. My Lords, the appeal submits for decision a novel question on the construction of the Factories Act, 1937. It is whether the provisions of sections 14 (1), 16 and 20 of the Factories Act, 1937, apply to machines or machinery manufactured in the factory or only to machines or machinery for use in the factory in the processes of manufacture or as ancillaries to these processes. There is no reported case in which this question has been decided. The same question might have arisen under the earlier Act of 1901, and, though it is not necessary to decide the point, I see no reason to differ from the opinion of Lord Patrick,¹² that there is no difference material to this question between the language of the Act of 1901 and the language of the Act of 1937.

My Lords, I agree with the learned judges in the courts below that sections 14, 16 and 20 of the Factories Act, 1937, do not apply to machines within the factory which are the products of the manufacturing processes carried on in the factory.

Section 14 (1) provides that: "Every dangerous part of any machinery, other than prime movers and transmission machinery, shall be securely fenced unless it is in such a position or of such construction as to be as safe to every person employed or working on the premises as it would be if securely fenced: Provided that, in so far as the safety of a dangerous part of any machinery cannot by reason of the nature of the operation be secured by means of a fixed guard, the requirements of this subsection shall be deemed to have been complied with if a device is provided which automatically prevents the operator from coming into contact with that part." If the subsection applies to the dough-brake, it must follow that section 16, which deals with the construction and maintenance of the guard required by section 14 (1), will apply. So, also, will section 20, which provides that: "A woman or young person shall not clean any part of a prime mover or of any transmission machinery while the prime mover or transmission machinery is in motion, and shall not clean any part of any machine if the cleaning thereof would expose the woman or young person to risk of injury from any moving part either of that machine or of any adjacent machinery."

For the purposes of this case the parties were agreed that "machine" and "machinery" could be regarded as inter-

¹² 1950 S.C. 371, 381.

changeable terms. For the appellant it is contended not only that "any machinery" in section 14 (1) and likewise "any machine" in section 20 are words capable of applying to the dough-brake but that in their ordinary literal meaning they do so apply. It would be difficult to dispute this contention in the abstract. But the context must be looked at and I find in the context supplied by sections 12 and 13 compelling reasons for construing the word "machinery" in section 14 (1) as denoting only machinery used for production.

It is necessary to notice the inter-relation of the three sections. Section 12 deals with prime movers, section 13 with transmission machinery, and section 14 (1) with "any machinery other than prime movers and transmission machinery." If it can be shown that the prime movers and the transmission machinery are prime movers and transmission machinery used as part of the factory equipment for its manufacturing processes, it is a logical inference that "any machinery other than prime movers and transmission machinery" means any other machinery used in the factory for or ancillary to its manufacturing processes.

Now, section 12 (1) deals with flywheels directly connected with prime movers and with every part of any prime mover not excepted by subsection (3) "whether the flywheel or prime mover is situated in an engine-house or not." It is apparent from these words that the subsection applies to a flywheel or prime mover which may be in the factory engine-house and therefore part of the factory equipment. Subsection (2) deals with the head and tail race of every water-wheel and of every water-turbine, and these must necessarily be part of the factory plant. Subsection (3) excepts from the operation of subsection (1) electric generators, motors and rotary converters if they are in such a position or of such a construction as to be as safe to every person employed or working on the premises as they would be if securely fenced. The implication of the subsection is that the machinery excepted may have a permanent position in the factory which in itself secures safety. This subsection also appears to be concerned only with machinery which is part of the factory equipment. Section 13 is throughout dealing with "the transmission machinery." The use of the definite article is unintelligible unless the transmission machinery is the transmission machinery used in the factory for its processes of manufacture. Lord Patrick's judgment puts the argument in a clear

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light when he says¹³ that sections 12 and 13 obviously are concerned with plant used in manufacture and that section 14 then naturally follows, to include the rest of the machinery used in the process of production.

These considerations conclude the case against the appellant. For section 16 can apply only if section 14 (1) applies, and in section 20 the division, prime movers, transmission machinery and any machine, corresponds to and repeats the division of machinery in sections 12 to 14.

It appears to me that there is no ambiguity or difficulty in construing the sections founded on by the appellant and that it is quite unnecessary to have recourse to presumptions or maxims which may be an aid to construction when there is ambiguity or doubt. I therefore propose to say nothing about the judicial observations cited to us on the proper approach to the construction of ambiguous phraseology in remedial statutes or in penal statutes. Nor do I find it necessary to rely on certain other sections in the Act which are referred to in the judgments of the courts below or which were referred to in the argument. It is true that other sections in the Act are by their terms restricted to premises, plant or equipment of the factory, yet, it might be said, if that were all, there would be no necessary inconsistency in giving to the words "any machinery" in section 14 (1) their literal and natural meaning and applying them to machinery within the factory which was the product of the factory. But I cannot find that any of the provisions of Part II of the Act apply to any machinery except machinery which is part of the factory and used in the manufacturing processes, and I think that none of them applies to machines made in the factory.

I would dismiss the appeal with costs.

LORD REID. My Lords, in this case your Lordships are only concerned with the alleged breach of statutory duty by the respondents. The case for the appellant can be stated shortly. Section 14 (1) of the Factories Act, 1937, requires that "every dangerous part of any machinery other than prime movers and transmission machinery" shall be securely fenced except in circumstances which did not exist in this case. The appellant, while in the respondents' employment and doing work in the respondents' factory which he had been instructed to do, was injured by a dangerous but unfenced part of a machine which was in the factory and that dangerous part was neither a prime

¹³ 1950 S.C. 371, 382.

mover nor transmission machinery. The respondents' answer can be stated equally shortly. They manufacture machinery in their factory and this machine had been manufactured by them for sale and was not part of the equipment of their factory. They contend that section 14 only applies to machinery which is part of the equipment of a factory.

A number of arguments on both sides were based on inferences to be drawn from other parts of the Act and on general canons of construction. I do not think that these considerations afford much assistance in this case: the scope of section 14 must be determined by examining its terms and particularly the first part of it: "Every dangerous part of any machinery, other than "prime movers and transmission machinery. . . ." The reason why prime movers and transmission machinery are excepted is plainly because these kinds of machinery are dealt with by sections 12 and 13 respectively. If one looks at the terms of section 13 one can hardly doubt that the scope of that section is limited to transmission machinery which is part of the equipment of the factory, and the terms of section 12 strongly suggest a similar limitation of its scope. If the appellant is right Parliament has not provided any statutory protection where a prime mover or transmission machinery is present in a factory but is not part of its equipment, but it has provided statutory protection when other machinery is so present in a factory. In other words the word "machinery" where it first occurs in section 14 has a different scope from that which it has where it next occurs: in the first case "any machinery" includes machinery which is not part of the factory equipment; in the second case "machinery" in the phrase "transmission machinery" does not. I can find nothing in the context to justify this difference. Sections 12, 13 and 14 must be read together, and I think that, in the absence of any indication of a contrary intention, their scope must be held to be similarly limited.

I have had an opportunity of reading the speech which my noble and learned friend, Lord Normand, has just delivered, and I agree with it. In my opinion this appeal should be dismissed.

LORD TUCKER. My Lords, I agree.

LORD ASQUITH OF BISHOPSTONE. My Lords, I agree with the opinions expressed by my noble and learned friends. The case turns substantially on the construction of the words "any "machinery" in the first line of section 14 (1) of the Act of 1937.

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- Construed quite literally these words would no doubt include almost anything, for instance, a bicycle or motor-car casually left on any premises. But the Act applies only to factories (section 151). A "factory" connotes a place in which things are made, and by the definition in the present Act it includes a place where they are "repaired," "adapted for sale," and the like. When in such a statute "machinery" of, or in, such a factory is spoken of, *prima facie* the expression surely relates to the machinery by which the things in question are made, repaired or adapted for sale; not the things themselves, even if those things themselves consist also of machinery. The assumption that such a limitation is intended is, in my view, strongly reinforced by the collocation—the architecture, if that expression may be allowed—of sections 12, 13 and 14. Section 14 (1) makes provision for the precautions to be taken in relation to "any machinery, other than prime movers and transmission machinery." Going back, we find that section 13 (1) has already made provision for the precautions to be taken in relation to "*the* transmission machinery." Not "transmission machinery" but "'the' transmission machinery." The definite article clearly limits this expression to "transmission machinery" used as factory plant, and prevents it from extending to transmission machinery (if any) produced by the factory plant. In my view, a similar limitation, though not express, must be read into section 12, which deals with precautions in relation to "prime movers." It would be a very capricious statute which, in the case of a factory which both used and produced prime movers and both used and produced transmission machinery, provided by one of its sections—section 12—that certain protection should be afforded to the worker both in regard to the used and produced prime movers, whereas by another—section 13—it provided that he should enjoy corresponding protection only in regard to the used, and not in regard to the produced, transmission gear. If this is so, when section 14 (1) makes provision in regard to "any machinery, other than prime movers and transmission machinery," the exception carved out of "any machinery" consists entirely of plant, and it seems right to read the whole from which the exception is carved out as also limited to machinery used as plant. The structure of sections 12, 13 and 14, to my mind, implies that their operation is wholly within the framework or ambit of machinery used as a productive agent, and does not extend to

machinery emerging as a product. For these short reasons I respectfully concur with the conclusion at which my Lords have arrived, and, like them, would dismiss the appeal.

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LORD COHEN. My Lords, I agree.

Appeal dismissed.

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Solicitors: *W. H. Thompson for D. G. M'Gregor W.S., Edinburgh, and Digby Brown & Co., Glasgow; Martin & Co., for Smart, Macdonald & Prossers, Edinburgh, and Biggart, Lumsden & Co., Glasgow.*

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Scotland—Divorce—Mental cruelty—No physical violence—Matrimonial Causes Act, 1937 (1 Edw. 8 & 1 Geo. 6, c. 57), s. 2—Divorce (Scotland) Act, 1938 (1 & 2 Geo. 6, c. 50), s. 1 (1) (c).

In a wife's action for divorce in Scotland on the ground of mental cruelty, there were averments that the husband had been guilty of conduct calculated to hurt her and deliberately persisted in with knowledge of the resulting injury to her health and also that resumption of cohabitation would entail reasonable apprehension of danger to her health:—

Held, that the averments were relevant to go to proof.

Despite the difference between the language of section 176 (c) of the Supreme Court of Judicature (Consolidation) Act, 1925, as substituted by section 2 of the Matrimonial Causes Act, 1937 (now section 1 (1) (c) of the Matrimonial Causes Act, 1950) and the language of the Divorce (Scotland) Act, 1938, s. 1 (1) (c), there is no divergence in principle between the law of Scotland and the law of England as regards the kind or degree of cruelty necessary for divorce. The Act of 1937 did not introduce any alteration of principle in the law of cruelty previously in force.

Decision of the First Division of the Court of Session, 1951 S.C. 286, reversed.

* *Present*: LORD NORMAND, LORD MERRIMAN, LORD REID and LORD TUCKER.

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APPEAL from the First Division of the Court of Session.

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The facts and averments, stated by Lord Reid, were as follows :

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The appellant, Mrs. Ethel Jamieson, was the pursuer in an action for divorce on the ground of cruelty. The respondent, Edward Jamieson, pleaded that, the pursuer's averments being irrelevant, the action should be dismissed. This plea was sustained by the Lord Ordinary by interlocutor of July 19, 1950. The appellant reclaimed against that interlocutor, and on January 9, 1951, the First Division by a majority (the Lord President and Lord Carmont, Lord Keith dissenting) adhered to the interlocutor of the Lord Ordinary. This was an appeal to the House of Lords against that interlocutor.

The appellant's extensive averments included the following matters: The parties were married on March 20, 1936, and they lived together until the appellant left the respondent in February, 1950, about four months after she had raised the action. There were three children of the marriage, born between 1939 and 1945, of whom two survived. The appellant's specific averments were prefaced by this general averment: "Initially the marriage was "quite happy, but gradually it became apparent that the defender "intended to impose his will on the pursuer." There were averments regarding the sexual relations of the parties. [These were not relied on by counsel for the appellant except as part of the history of the marriage and as throwing light on the relationship of the parties.] It was averred: "Since they were married "the pursuer has been forced to keep the house and the two "children on the same housekeeping allowance as she was given "at the start of the marriage . . . which has invariably proved "completely insufficient. . . . The pursuer has had to ask the "defender for extra money on frequent occasions to meet necessary expenses. On such occasions the defender has always "refused to give it to her, and in so doing has frequently told "the pursuer that he hated the sight of her and shut the door of "his bedroom in her face so that the subject could be pursued "no further. . . . The defender has also been frequently rude "and threatening to his wife in the presence of the children and "greatly humiliated her. On one recent occasion in the winter "of 1949 the defender, in the presence of the children, threatened "to throw the pursuer down the stairs of their house." [It was not suggested that this averment was intended to show that the appellant was in any danger from physical violence; her counsel presented it rather as an example of the rude, threatening and

humiliating conduct of the respondent previously averred. There was no allegation either of physical violence or of any serious apprehension of violence.] It was further averred that the defender had not entertained the pursuer in any way and that he had refused to share his life with her or to discuss his business or money matters with her. "The defender ignores the pursuer in the house, and although he is, or ought to be, aware that his general conduct towards her . . . causes her great grief, puts a considerable strain on her nerves and has caused a serious breakdown in her health, he persists in it. . . . The defender's cruel course of conduct . . . so undermined the pursuer's mental and physical health that during 1944 she consulted Dr. D. A. Cunningham . . . who is still treating her. Due to the continuance of the defender's cruel treatment towards her, the pursuer's health both physical and mental has rapidly deteriorated in the last 12 months and it is believed and averred that she is on the verge of a complete breakdown. In or about 1947 the defender's treatment of her so preyed on her mind that she attempted to commit suicide by putting a gas tube in her mouth. . . . The pursuer believes and avers that a continuance of life with her husband would be seriously injurious to her life, health and peace of mind, and she is afraid to continue to live with him. The pursuer believes and avers that the defender is fully aware of the cruelty he has inflicted on the pursuer, but at no time has he attempted to be considerate towards his wife or make her life with him happy or even bearable."

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McLean K.C. and *Grieve* (both of the Scottish Bar) for the appellant wife. The appellant has relevantly averred that her husband has been guilty of cruelty towards her within the meaning of section 1 (1) (c) of the Divorce (Scotland) Act, 1938. In this matter there is no difference between the law of Scotland and the law of England. What Lord Normand said in *Weatherley v. Weatherley*¹ referred only to divorce for desertion, which is quite different, deriving as it does from old Scottish statute law. The effect of the words in the Scottish Act and of the corresponding words in section 2 of the Matrimonial Causes Act, 1937, is exactly the same. The difference in language is more apparent than real. Neither Act defines "cruelty," but the Scottish Act does what the English Act does not do expressly; it refers to "the law and practice existing at the passing of this Act, for

¹ [1947] A.C. 628, 635.

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“granting a decree of separation.” The reason for this language is that while there is no difference between the law of Scotland and the law of England as to what constitutes cruelty for the purposes of granting a separation, there was a question in Scottish law whether a lesser degree of cruelty would afford a defence in an action of adherence. Therefore the Scottish Act defined the sort of cruelty necessary for a divorce. Thus in divorce cases the standard required by the courts of the two countries is the same or, at any rate, not so different that judgment can be given without inquiring into the facts. The standard in the averments does not depend on the personal views of the judge, and if the averments come up to the standard required in the authorities the case must go to proof, though on proof a judge in Scotland might dismiss a case when an English judge would not.

No case in Scotland has been dismissed on the relevancy where in an action for divorce on the ground of cruelty there is an averment of anticipated danger to health. Here the wife avers conduct which has caused injury to her health and which would make it unsafe for her to continue to live with the husband. The remedy of divorce on the ground of cruelty is granted to protect the innocent spouse in the future and not to punish the guilty spouse for the past. It is only by way of proof that a true estimate of the possible danger to the wife, if she continues to live with her husband, can be made. At this stage it must be assumed that the wife’s averments are true, so far as they relate both to her husband’s conduct and to the effects of that conduct on her health.

Cruelty must be regarded in relation to the particular spouse because what would be cruel to one person might not be cruel to another. Accordingly you cannot deal with a case like this on the relevancy because the nature and quality of the same act may be different according to the circumstances and the intention. One cannot have a conception of cruelty in the abstract unrelated to its effects, since people are infinitely varied in their make-up and what might be cruel to one might make no impression at all on another. Thus, cruelty being a question of fact, it cannot be properly determined on pleadings only whether there has been cruelty in fact. It can only be decided on the evidence and the judge must estimate the standard of culture of the parties, their habits of expression and actions and their interaction in daily life. There is no hard dividing line on paper between conduct

which is cruel and conduct which is not. It cannot be measured by any absolute or objective standard. H. L. (Sc.)

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In Scotland, actions in respect of purely mental cruelty are few, though they are perfectly competent. It is accepted as good ground for divorce in Scotland as well as in England provided it may affect health: see *M'Lachlan v. M'Lachlan*² and *Hutchinson v. Hutchinson*.³ Here there is no allegation of physical violence or of any danger of physical violence. The husband's threat in the winter of 1949 was rather an example of his rude and humiliating conduct. Mental, like physical, cruelty can take many forms. In order relevantly to aver a case of mental cruelty it is necessary to aver that the defender's conduct was aimed at or directed against the pursuer and that the conduct complained of caused injury to health or a reasonable apprehension of such injury. The wife's averments here clearly show that the husband's conduct was aimed at her, and she also avers that the conduct caused injury to her health.

The requirement that the conduct complained of must be "towards" or "aimed at" or "directed against" the complaining spouse distinguishes it from the conduct of a military volunteer with a sense of patriotic duty, who pursues his course although it may affect his wife's health, or of a ship's captain who persists in following his calling in similar circumstances. Though some acts are obviously cruel, whatever the intention behind them may be, and even if there is no intention to injure, there are other acts which, though they may produce injury to health, will be cruel or will not be cruel according as there is or is not malice present. This shows how important it is that such cases should go to proof.

What amounts to cruelty was discussed in *Paterson v. Russell*,⁴ and it was described there by Lord Brougham as "any conduct "towards the wife which leads to any injury creating danger to "her life or danger to her health." This was approved in *Graham v. Graham*⁵ and in *Dunlop v. Dunlop*.⁶ Though wide, it is accurate and recognizes that cruelty is a question of fact and that the conduct, in order to be cruel, must be directed against or aimed at the complaining spouse. In *Usmar v. Usmar*,⁷ *Squire v. Squire*⁸ and *Lauder v. Lauder*⁹ the conduct complained of

² 1945 S.C. 382, 391.

³ 1945 S.C. 427.

⁴ 1850, 7 Bell, App. 337, 353, 363, 370, 371.

⁵ (1878) 5 R. 1093, 1095.

⁶ 1950 S.C. 227.

⁷ [1949] P. 1, 4.

⁸ [1949] P. 51, 56, 57.

⁹ [1949] P. 277, 288-9.

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The court below was wrong in holding that the acts complained of were not serious enough to amount to cruelty in Scottish law. The wife avers a course of conduct aimed at her throughout her whole married life. (Her averments as to the sexual relations of the parties are only relevant as part of the history of the marriage.) She avers that the husband's conduct was persisted in by him in the full knowledge that her health was being injuriously affected by it. (In such cases regard must be had to the defender's knowledge, actual or probable, of the effect of his conduct on the pursuer's health.) She also avers that her health has deteriorated as a result of the husband's conduct and that she requires protection from it in the future. The question whether the wife can safely live with the husband again cannot be answered on a mere analysis of the conduct complained of; its effect must be assessed by way of a proof, viewing together the conduct and the resultant injury.

The case should not have been dismissed on the relevancy and the court below misapprehended the quality of cruelty required in Scotland for divorce.

[They referred to *Thomas v. Thomas*¹⁰; *Mackenzie v. Mackenzie*¹¹; *Russell v. Russell*¹²; *Aitchison v. Aitchison*¹³; *Meacher v. Meacher*¹⁴; *Bennett v. Bennett*¹⁵; *Kaslefsky v. Kaslefsky*¹⁶ and the Evidence (Scotland) Act, 1853.]

Shewan K.C. and *Anderson* (both of the Scottish Bar) for the respondent husband. The averments of the wife are irrelevant and insufficient in law to support the conclusions of the summons, and the court below was right in refusing to order a proof before answer.

The parties lived together in the same house for 14 years and three children were born. The wife left her husband in February, 1950, four months after the action for divorce was raised. She does not point to any "last straw" as having led to a final breach. There was no noteworthy or dramatic change in the relations of the parties over the 14 years. The wife avers that

¹⁰ [1947] A.C. 484; 1947 S.C. (H.L.) 45.

¹¹ [1895] A.C. 384, 389-90, 402, 405, 406, 409-10, 415.

¹² [1897] A.C. 395, 399, 456, 459, 460.

¹³ 1902, 10 S.L.T. 331, 332.

¹⁴ [1946] P. 216.

¹⁵ 1949 S.L.T. (Notes) 40.

¹⁶ [1951] P. 38.

at first the marriage was happy and in the court below she abandoned the part of her case relating to early sexual difficulties. There is no averment of malice, and it is not everything that may cause injury to a wife's health that is malicious or cruel. It is not malicious or cruel for a husband to go to fight in war or for a captain to remain on his sinking ship, although either course might reduce his wife to a state of nervous prostration. There must be limits to the assumption of the general truth of what the appellant here avers. If, for instance, it is found that she has made two inconsistent or two alternative averments, the court can only take one to be true. The averments must be read in their context and here some of the averments are inconsistent with each other.

The averments do not come up to what the law of Scotland requires to establish cruelty. Though there is not any reported case of dismissal on relevancy in an action for divorce on the ground of cruelty, it is not unprecedented to dispose of a consistorial case on relevancy: see *Duffy v. Duffy*.¹⁷ The step of tabling a plea of relevancy is used either to cut a case short and save expense or to make one's opponent give full particulars and put into focus the true controversy between the parties, maintaining the standards of pleading. Dismissal on relevancy does not necessarily bar a fresh action. The test of relevancy is whether a pursuer's averments would necessarily lead to a conclusion in her favour: see *M'Dougal v. M'Dougal's Trustees*.¹⁸ Since the wife's averments do not pass this test it would be unfair and undesirable that an inquiry should be allowed. Ambiguous averments will not do. The wife here has been given the fullest opportunity to disclose and detail her grievances until, it seems, she can make no more of them. The court has said that in law there is no justification for allowing her to go to proof because the facts averred do not give rise to the remedy she asks. Inquiry is not stifled. Even in an action for divorce for cruelty the standards of relevancy should not be relaxed. It would be wrong to say that no consistorial case can fail for lack of relevance.

To justify the granting of a divorce for cruelty there must in the law and practice of Scotland be grave, weighty and substantial reasons. There must also be ill-effects to the health of the pursuer, actual or to be reasonably apprehended from the defender's conduct. Nowhere in the judgments appealed against is there any doubting of the law in the cases cited for the appellant, but

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¹⁷ 1947 S.C. 54.¹⁸ 1931 S.C. 102, 114.

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inasmuch as her averments disclose only a case of injury or apprehended injury to life or health, not reasonably to be anticipated in the case of a person of normal firmness, these averments fall short of the requisites to support an action for divorce for cruelty, whereas she contends that any conduct may constitute cruelty provided the ill-effects, actual or apprehended, are established. But, for example, mere unkindness or absence of proper affection does not constitute cruelty in law (e.g., the case of a husband who always read the newspaper at every meal to shut out his wife), although it might cause a nervous affection in the wife.

It is not necessary to contend that before 1938 there was any substantial difference between the law of Scotland and that of England on the present point, though differences have developed in the standards applied in the two countries. However, if it be heresy to suppose that the difference in the terms of the Acts of 1937 and 1938 was significant, it is one widely held among Scottish judges. The English decisions relied on by the appellant are not criticized because they do not purport to be arrived at under the Scottish Act, and they are not necessarily indicative of the law of Scotland, but in *Lauder v. Lauder*¹⁹ two essential elements of a charge of cruelty are laid down: ill behaviour coupled with danger to health, and from that it appears that any conduct is not sufficient to attract the remedy. *M'Lachlan v. M'Lachlan*,²⁰ relied on by the appellant, is a very exceptional case and ought not to be extended; the respondent is concerned neither to invoke it nor to doubt it. *Bennett v. Bennett*²¹ was also exceptional by reason of the husband's abnormal behaviour. There is no reported case in Scotland where divorce has been granted on the ground of purely mental cruelty without some element of physical violence. The law of Scotland requires a consideration of the effect of the conduct complained of on the pursuer and divorce has been refused unless the remedy sought appeared necessary for the protection of life or health: see *Thomas v. Thomas*.²² At the same time the character of the conduct complained of is supremely relevant. Here the wife avers that the husband's conduct has caused deterioration in her health and that continuance of life with him would seriously injure her health and peace of mind, and on relevancy these averments must be taken to be true, but by themselves they are not sufficient.

¹⁹ [1949] P. 277, 288.²⁰ 1945 S.C. 382.²¹ 1949 S.L.T. (Notes) 40.²² [1947] A.C. 484; 1947 S.C. (H.L.) 45.

It has still to be considered whether the husband's conduct as averred is of such a character as to justify decree. The decision lies between conduct which is cruel in law and conduct which is insufficient to merit that description. Not all cruelty in the ordinary sense gives ground for divorce, e.g., drunkenness.

This case discloses no divergence of principle and the question is one of degree on which it would be wrong to disturb the findings of the court. All the judgment of the court below means is that there is a lower limit beyond which there cannot be divorce for cruelty. The court has not been shown to have misapplied the law or to have acted under any misapprehension.

McLean K.C. in reply. There is no reported case in which an action for divorce on the ground of cruelty has been dismissed on relevancy where there is an averment of injury to health. In this case all the necessary averments are present to make it relevant.

Their Lordships took time for consideration.

March 20. LORD NORMAND. My Lords, the circumstances which have led to this appeal are set out in the opinion which will be delivered by my noble and learned friend, Lord Reid.

We have to consider whether the averments of the pursuer and appellant are relevant to infer such cruelty towards her as would justify, according to the law and practice existing at the passing of the Divorce (Scotland) Act, 1938, the granting of a decree of separation a mensa et thoro, and therefore of a decree of divorce a vinculo since the passing of that Act.

The action is based on what is conveniently called mental cruelty. Physical violence is not averred, but there are averments of conduct by the respondent causing injury to his wife's health and persisted in after he was aware of its injurious effects. There is also an averment that a continuance of life with the respondent would be seriously injurious to the appellant's health. Mental cruelty was well recognized as a ground for an action of separation long before the passing of the Act of 1938. Thus, in *Aitchison v. Aitchison*²³ Lord Low held that conduct of a defender, if it was improper and unjustifiable and if it caused injury to the pursuer's health, was a good ground of action, although no physical violence was averred. He distinguished the well-known case of *Russell v. Russell*²⁴ because in that case there was no evidence of injury to the plaintiff's health.

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²³ 1902, 10 S.L.T. 331.²⁴ [1897] A.C. 395.

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The Lord President found it necessary, in view of some of the arguments addressed to the First Division, to vindicate the jurisdiction of the court to entertain the plea of relevance and to dismiss actions of this sort upon consideration of the averments. There ought to be no doubt whatever that, if the defender in such an action as this moves the court to sustain a plea to relevance, the court is bound to entertain the plea and to examine the averments no less strictly than in any other action, nor that, if it comes to the opinion that the averments do not satisfy the test of relevance, its duty is to sustain the plea and dismiss the action. The dismissal of an action when the averments do not satisfy the test of relevance not only saves the parties unnecessary expense but, as the Lord President pointed out,²⁵ avoids, in a divorce case, the exacerbation of the parties' feelings and the destruction of any chance of reconciliation which are often inseparable from the ventilation in evidence of their charges and counter-charges and mutual suspicions. The test of relevance is the same for all actions; there is not one standard for actions of divorce and another standard for other actions. Counsel for the respondent submitted at the hearing of the appeal that, if the pursuer's averments do not necessarily lead to a conclusion in her favour, the case is not relevant, and he cited in support of that proposition the opinion of Lord Hunter in *M'Dougal v. M'Dougal's Trustees*.²⁶ Lord Hunter's opinion is entitled to weight; nevertheless, I think that the test was not accurately formulated by him. The true proposition is that an action will not be dismissed as irrelevant unless it must necessarily fail even if all the pursuer's averments are proved. The onus is on the defender who moves to have the action dismissed, and there is no onus on the pursuer to show that if he proves his averments he is bound to succeed. In the present case, however, the basis of the judgments both of the Lord Ordinary and of the learned judges of the majority in the First Division is that if all the pursuer's averments were proved she would be bound to fail.

There was some difference of opinion between the Lord President and Lord Carmont on the question whether a defender's conduct is to be judged by reference to its probable effect on the health of a pursuer of normal susceptibilities or whether it is relevant for a pursuer to aver that the conduct alleged did in fact cause him or her mental suffering and consequent injury to health. Neither of the learned judges proposed a dogmatic

²⁵ 1951 S.C. 286, 295-6.²⁶ 1931 S.C. 102, 114.

answer, and for my part I am respectfully inclined to accept the Lord President's view ²⁷ that the conduct alleged "must be judged up to a point by reference to the victim's capacity for endurance, in so far as that capacity is or ought to be known to the guilty spouse." There is the high authority of Lord Watson in *Mackenzie v. Mackenzie* ²⁸ for the proposition that much depends in each case upon its circumstances and in particular upon the victim's capacity for endurance. That leaves it open to find, after evidence, that the pursuer was the victim of his or her own abnormal hyper-sensitiveness and not of cruelty inflicted by the defender. But the cases in which such a decision would be possible without evidence must be exceedingly rare, and this case is certainly not one of them.

The Lord President, I think, reaches the crux of the case when he says ²⁹ that "where the cruelty is of the type conveniently described as 'mental cruelty,' the guilty spouse must either intend to hurt the victim or at least be unwarrantably indifferent as to the consequences to the victim." There is room for differences of opinion about what kinds of case may be covered by the words "unwarrantably indifferent." I do not propose to go into that because I wish to avoid the discussion of hypothetical cases and because I am of opinion that actual intention to hurt may have in a doubtful case a decisive importance, and that such an intention has been averred here. Actual intention to hurt is a circumstance of peculiar importance because conduct which is intended to hurt strikes with a sharper edge than conduct which is the consequence of mere obtuseness or indifference. My noble and learned friends have discussed the averments in the opinions which they will deliver and which I have had the advantage of reading, and they have shown that the appellant has averred a case of actual intention to hurt, wilfully persisted in after the injury to the appellant's health was apparent to the respondent. These averments are, in my opinion, relevant and they are, I think, supported by sufficiently specific instances of the respondent's alleged cruelty. I therefore agree that the action should go to proof.

My Lords, I think that it does not do justice to the averments to take up each alleged incident one by one and hold that it is trivial or that it is not hurtful or cruel and then to say that cumulatively they do not amount to anything grave, weighty or serious. The relationship of marriage is not just the sum of a

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²⁷ 1951 S.C. 286, 294.²⁹ 1951 S.C. 286, 294.²⁸ (1895) 22 R. (H.L.) 32, 44.

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number of incidents, and in this case it has been overlooked that all the incidents averred are said to have been inspired by the respondent's intention to impose his will upon his wife without consideration of her feelings or health. Moreover, it is impossible in the bald averments of a condescendence to convey the effects of the conduct of one spouse on the feelings and through the feelings on the health of the other spouse. What on paper may seem little more than a series of pin pricks may present a very different aspect when it has been developed in evidence, though the evidence does not exceed by a single word the bounds set by the record. These considerations do not derogate from the jurisdiction of the court, but they do impose special caution in the application of the test of relevance to actions founded on mental cruelty. The observations of noble Lords in *Thomas v. Thomas*³⁰ on the value to be attached in an action of divorce for cruelty to the opinion of the Lord Ordinary who saw and heard the witnesses, especially the parties, though they are directed to the caution which a court of appeal should observe in reversing the Lord Ordinary's decision after proof, carry also a warning on the caution to be observed in dismissing an action without proof and on consideration of the averments alone.

The Lord President has suggested³¹ that under the Matrimonial Causes Act, 1937, the courts in England have, for the purposes of divorce, adopted in principle a less exacting standard of cruelty than was required for the purposes of separation, whereas the Scottish courts have, in compliance with the express provision of the Divorce (Scotland) Act, 1938, adhered to the principles already established in actions of separation. It would be a misfortune if that were so. Certainly before 1937 the courts of England and Scotland followed the same principles in granting and refusing judicial separation for cruelty. The law they both administered was derived from the ecclesiastical courts, and decisions in Scottish cases and in English cases were cited indifferently in both countries, as, indeed, they still are. The position is entirely different from that in the law of divorce for desertion, and I regret an unguarded sentence of mine in *Weatherley v. Weatherley*³² if it has led to confusion through being thought to apply beyond divorce for desertion, which was the subject-matter of that case.

When divorce on the ground of cruelty was introduced, a difference was made between the language of section 176 (c) of

³⁰ [1947] A.C. 484.

³² [1947] A.C. 628, 635.

³¹ 1951 S.C. 286, 292.

the Supreme Court of Judicature (Consolidation) Act, 1925, as substituted by section 2 of the Matrimonial Causes Act, 1937 (now section 1 (1) (c) of the Matrimonial Causes Act, 1950), and the language of the Divorce (Scotland) Act, 1938, s. 1 (c). The Scotch Act expressly prescribed that the cruelty that shall justify divorce shall be the same cruelty "as would justify, " according to the law and practice existing at the passing of " this Act, the granting of a decree of separation." The English Act had made no reference to existing law or practice. It humbly appears to me that the reason for this difference is not very abstruse. In England before 1937 cruelty played a part, if a subordinate part, as a ground of action in divorce when the husband was the defendant, and, as I understand, the cruelty was the same in kind and degree as the cruelty that would justify a decree of separation in England or in Scotland. In Scotland cruelty had no place as a ground or partial ground of action in divorce, but it had a place as a defence in actions of adherence and consequently in actions of divorce for desertion. But there was a controversy whether a less degree of misconduct would serve as a defence in an action of divorce for desertion than was required as the foundation of a decree of separation. The question was discussed in *Mackenzie's* case,³³ and opinions upon it were reserved. Accordingly, it was appropriate that the Scotch Act should define the kind and degree of cruelty to be required as the ground of an action for divorce. It was not necessary to do this in the English Act since cruelty was already recognized as a partial ground of action in divorce procedure and it was cruelty of the same kind and degree as was necessary for separation. If that is the explanation of the difference of language between the two Acts, that difference ought not to have led to any divergence in principle between the law of Scotland and the law of England as regards the kind or degree of cruelty necessary for divorce. It is not necessary in this appeal to consider whether there has been in English cases a departure from principles firmly established as part of the law of cruelty before 1937. There may be a difference between the views of individual judges on the value of the facts proved as justifying a finding of cruelty, but that is not a difference of principle. Uniformity of judgment in assessing the value of facts is an ideal which is never attained, even in the courts of a single country. It has sometimes been said in England that the

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Scottish courts have been too easy and liberal in granting divorce, and sometimes the same has been said in Scotland of the English courts. Allowance in judging of the significance of language or conduct used by one spouse to another must be made for national, local and social habits, but I would find it difficult to sustain an argument that a country which, since the Reformation, has allowed divorce for adultery to either spouse and to both spouses and has, since 1573, allowed divorce for desertion to either spouse, has consistently followed a tradition more favourable to the sanctity of the marriage tie than a country which permitted no action for divorce in its courts till the year 1857.

On another aspect of the Act of 1938 I respectfully and emphatically agree with the Lord President. The Act does not in any way restrain the development of the law of cruelty as the foundation of actions of separation or of divorce. I wish to add that nothing that I have said should be understood as casting doubt on the decision in *Dunlop v. Dunlop*.³⁴ I think that *M'Donald v. M'Donald*³⁵ was rightly decided, and I agree with the reasoning of the Lord Justice Clerk in that case. I have had the advantage of reading the opinion about to be delivered by my noble and learned friend, Lord Merriman, and I respectfully agree with his observations upon the identity of principles of the law of divorce for cruelty in England and Scotland.

I agree with the dissenting judgment of Lord Keith, and I would allow the appeal.

LORD MERRIMAN. My Lords, while I wish to make it plain that I cast no doubt on the jurisdiction of the court to entertain in a consistorial cause the plea of relevance, I agree with Lord Keith³⁶ that it is desirable to bear in mind, particularly in connexion with a charge of cruelty, how much depends on the general picture of the married life of the parties which it is so difficult to appreciate without a proof. Nowhere has the advantage, particularly in this class of case, of seeing and hearing the witnesses been stated more emphatically than in the opinions of Lord Thankerton and Lord Macmillan in *Thomas v. Thomas*.³⁷ It is true that their observations were directed to limiting the right of an appellate tribunal to interfere with the findings of a trial judge who has had that advantage. Nevertheless the application of these observations to the question before your

³⁴ 1950 S.C. 227.

³⁵ 1939 S.C. 173.

³⁶ 1951 S.C. 286, 298.

³⁷ [1947] A.C. 484, 487-91.

Lordships may be tested by supposing that the clear and accurate summary of the averments made by the Lord Ordinary in the passage beginning with the words³⁸: "The pursuer was married to the defender at Edinburgh on March 20, 1936," and ending with the sentence: "She alleges that in 1947 the defender's treatment of her so preyed on her mind that she attempted suicide by putting a gas tube in her mouth," was expressed, after proof, in the same words, *mutatis mutandis*, as a finding of the facts upon which a decree of divorce had been pronounced, and that there was sufficient evidence to support those findings. Let it also be supposed that your Lordships were hearing an appeal from a reversal of the Lord Ordinary by the Inner House, and that their judgment was founded on the version of those facts given by the Lord President, beginning with the words³⁹: "Considerable space is devoted to the sexual relations of the spouses" down to the words "so preyed upon her mind that she attempted to commit suicide by putting a gas tube in her mouth."

On these suppositions I think that the judgment would be open to criticism in the following respects: first, it is by no means clear in what sense the question of sexual relations was abandoned. It appears only to have been abandoned as a substantive charge but not as a basic factor on which much of the subsequent unhappiness between the parties was founded. Secondly, if, as I doubt, it can truly be said that the shortage of house-keeping money was "the main count," it was so because it is said that "on frequent occasions" the pursuer, with growing children, requested more money than she had had when she was first married, and the husband "always refused to give it to her, and in so doing has frequently told the pursuer that he hated the sight of her." This, and the further statement that the husband had been "frequently rude and threatening to kill his wife in the presence of the children and greatly humiliated her," appears in the Lord President's judgment⁴⁰ as "a few allegations of harsh language, some of the incidents being associated with the pursuer's demands for money, and one threat of violence alleged to have been made 'in the winter of 1949'—to throw the pursuer downstairs." This, which the Lord President describes as an "isolated incident" but which appears to be part of the allegation of humiliation by frequent rudeness and threats in the presence of the children,

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³⁸ 1951 S.L.T. 174-5.⁴⁰ *Ibid.* 295.³⁹ 1951 S.C. 286, 294-5.

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he finds it impossible to construe as indicative of ferocity or serious malignity of purpose. This statement renders all the more serious the omission in his judgment of any trace of the averment that the husband intended to impose his will upon the wife; and although the Lord President refers to the husband's conduct being said to have caused the pursuer "great grief" and to have been "a considerable strain on her nerves," so that in 1944 she consulted a doctor who is still treating her, he does not refer to the averment that the husband had persisted in what is alleged to be his callous conduct although he was aware not merely that it was causing her grief and putting a considerable strain on her nerves, but that it had caused a serious breakdown in her health.

On this version of the facts your Lordships' House would, in my opinion, be justified in holding that a reversal of the trial judge on the ground that it was ⁴¹ "a lack of accommodation, "failure of due consideration, selfish neglect and rudeness of "language" and nothing more, would conflict with the principles laid down in *Thomas v. Thomas* ⁴² because a court which had not had the advantage of seeing and hearing the witnesses had substituted its own findings of the facts for those of the trial judge.

I fully agree with your Lordships that the averment of an intention on the part of the husband to impose his will on the pursuer, and the averment of persistence in his callous conduct although aware of its effect on his wife's health, both of which are plainly made, are important averments in this case. In saying this, however, I must not be taken to suggest that either in England or in Scotland it is essential to impute to the wrongdoer a wilful intention to injure the aggrieved spouse in order to establish a charge of cruelty. In *Mackenzie v. Mackenzie* ⁴³ Lord Watson said: "I do not impute to the appellant that his "conduct, cruel and reprehensible as it was in my estimation, "was dictated by a wilful intention to injure the respondent." Likewise in *Kelly v. Kelly*, ⁴⁴ to which I shall recur later, because it is the leading case in England on the subject of cruelty without physical violence, Lord Penzance, in his judgment in the full court, said: "He says that he does not desire to injure her, and "it has never been asserted that he does." So also in *Squire v. Squire* ⁴⁵ Tucker L.J., as my noble friend then was, said that in his view the law on this point could not be more clearly

⁴¹ 1951 S.C. 286, 295.

⁴² [1947] A.C. 484.

⁴³ [1895] A.C. 384, 409.

⁴⁴ (1870) L.R. 2 P. & M. 59, 72.

⁴⁵ [1949] P. 51, 58.

expressed than in the brief statement quoted ⁴⁶ from the judgment of Shearman J. in *Hadden v. Hadden* ⁴⁷: "I do not question . . . that he had no intention of being cruel . . . but . . . his intentional acts amounted to cruelty." During the argument, however, the question arose whether the averments of the husband's intention to impose his will upon the pursuer and of persistence in his callous conduct although aware of its effect on her health could legitimately be supported at the proof merely by invoking the presumption that a person intends the natural and probable consequences of his acts. I deprecate the exclusion in advance of any particular method of proving an averment. I make this reservation because I am unable to agree with the Lord President's view ⁴⁸ that this presumption leads to the conclusion that if injury to health occurs "any" conduct, however meritorious, which brings about that result would be cruelty. I have expressed my own views on this matter recently in *Simpson v. Simpson* ⁴⁹ and I do not propose to repeat them, but I may perhaps be allowed to quote one sentence: "Without going through the careful examination of the doctrine in *Squire v. Squire*,⁵⁰ with which I respectfully agree, I venture to suggest that in this jurisdiction at any rate we may continue to use the time-honoured maxim, provided always that we remember that it does not express an irrebuttable presumption of law and that it is only to be applied in connexion with conduct which can fairly be described as ill-treatment."—because I coupled with it an observation of Lord Greene M.R., in *Buchler v. Buchler*.⁵¹ In relation to the kindred topic of desertion by expulsion of a wife from the matrimonial home, he said that conduct which did not amount to a justification for withdrawing from cohabitation could not be made so by a wife announcing her intention of leaving her husband if he did not change his conduct. He added: "This is not, in my opinion, affected by the doctrine that a person must be taken to intend the probable consequences of his acts; for if the acts are not such as to justify the wife in treating herself as expelled from the matrimonial home no inference can be drawn from those acts of an intention to expel her."—I do not regard the instances of the patriotic volunteer or of the gallant ship's captain given by the Lord President ⁵² as legitimate illustrations of the doctrine. However,

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⁴⁶ [1949] P. 51, 57.⁴⁷ The Times, Dec. 5, 1919, p. 5, col. 3.⁴⁸ 1951 S.C. 286, 292.⁴⁹ [1951] P. 320, 333.⁵⁰ [1949] P. 51.⁵¹ [1947] P. 25, 45.⁵² 1951 S.C. 286, 292-3.

H. L. (Sc.) I would not necessarily exclude Lord Carmont's illustration of the cat⁵³; for if a spouse insisted on introducing one into the home in spite of the knowledge that the other spouse was one of those persons who are made positively ill by the presence of a cat, that familiar pet could not then properly be described as "harmless."

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I must now turn to the suggestion of the Lord President⁵⁴ that by reason of what he terms "the marked contrast" in the wording of the English and Scottish Acts of 1937 and 1938 there has been a change in the legal conception of cruelty in England. The Lord President expressly concurred with observations to the same effect in the Inner House in *Dunlop v. Dunlop*⁵⁵ which appear to have been prompted by the decision of the Court of Appeal in *Meacher v. Meacher*.⁵⁶ It would be idle to deny that this case has raised, in England as well as in Scotland, the doubts to which allusion is made in the judgments under appeal. For instance, in his dissenting opinion in *Thomas v. Thomas*⁵⁷ Lord Simon, in support of the view that in the Scottish Act the words "has been guilty of cruelty" make it difficult to introduce as a necessary condition of divorce that further cruelty must be apprehended, though this was necessary if the remedy of separation was being sought, said: "In England, at any rate, 'it has been held by the Court of Appeal that under the Act 'of 1937 (where, however, the words differ from those used in 'the Scottish Act), a decree of dissolution on the ground of 'cruelty is based on past behaviour, and that there is no condition that the decree should be withheld 'unless there is also 'a reasonable fear that further acts of cruelty will be committed' (*Meacher v. Meacher*⁵⁸)." Lord Thankerton⁵⁹ and Lord Macmillan⁶⁰ expressly reserved their opinions. I am so fully in agreement with what my noble and learned friend, Lord Normand, has said on this matter that I should not have found it necessary to add anything, were it not that it may be thought advisable to consider whether the divergence supposed to be represented by these two cases is not in truth more apparent than real. I need not pursue what my noble friend has said about the reason for the wording of the Scottish Act. I shall try to show that in this country we do not recognize two degrees of

⁵³ 1951 S.C. 286, 297-8.

⁵⁴ Ibid. 291.

⁵⁵ 1950 S.C. 227.

⁵⁶ [1946] P. 216.

⁵⁷ 1947 S.C. (H.L.) 45, 52.

⁵⁸ [1946] P. 216.

⁵⁹ 1947 S.C. (H.L.) 45, 54.

⁶⁰ Ibid. 60.

cruelty, although, as the Court of Appeal in *Russell v. Russell* ⁶¹ itself decided, conduct which is expressly held not to be cruelty may nevertheless be an answer to a suit for restitution of conjugal rights. Suffice it to say that when Parliament, in the Act of 1938, defined the cruelty on which divorce first became permissible in Scotland, it was in fact following a precedent set by section 27 of the Matrimonial Causes Act, 1857, whereby divorce for cruelty was first allowed in England. It is true that the Act of 1857 made it necessary to couple adultery with the charge of cruelty, but it was expressly provided, as in the Scottish Act of 1938, that the cruelty must be such as, without adultery, would have entitled the wife to divorce a mensa et thoro. Elsewhere in the Act the word "cruelty" occurs by itself (section 16), and in section 31, making cruelty a discretionary bar to divorce, the words are "has been guilty . . . of cruelty." So far as I am aware, however, no distinction has ever been drawn between those phrases in relation to the Act of 1857. But it does not end there. By the Matrimonial Causes Act, 1866, s. 2, if either spouse in a suit instituted for dissolution of marriage opposed the relief sought on the ground, inter alia, of "cruelty," the court might give the respondent the same relief to which he or she would have been entitled if he or she had filed a petition seeking such relief. This section was replaced in substantially the same terms by section 180 of the Supreme Court of Judicature (Consolidation) Act, 1925. Likewise, in the proviso to section 176 of that Act, preserving the right of a wife to present a petition on any ground on which she might have done so before the Matrimonial Causes Act, 1923, enabled her to obtain a divorce on the ground of adultery alone, it is provided that on any petition presented by a wife for divorce on the ground of the "adultery and cruelty" of her husband the parties shall be competent and compellable witnesses with regard to "the "cruelty." Again, when by the Summary Jurisdiction (Married Women) Act, 1895, magistrates were enabled to make an order in favour of a wife on the ground of "persistent cruelty" Evans P., in *Cornall v. Cornall*,⁶² said that cruelty in section 4 of that Act meant the same thing as cruelty had always meant in the Divorce Court, but with the addition of the element of persistence. This, as has been repeated by the Divisional Court of the Probate Division more than once in recent weeks, precludes the making of an order on a single act, however grave, but

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⁶¹ [1895] P. 315. ⁶² (1910) 74 J.P. 379, 380.

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has no other effect on the meaning of "cruelty." Finally, by section 5 of the Matrimonial Causes Act, 1937, itself, the decree of judicial separation is dealt with by the substitution of two new subsections for the corresponding subsections of section 185 of the Supreme Court of Judicature (Consolidation) Act, 1925. The first of these enables a petition to be presented for judicial separation "on any grounds on which a petition for divorce might have been presented, . . . or on any ground on which a decree for divorce a mensa et thoro might have been pronounced immediately before the commencement of the Matrimonial Causes Act, 1857." In relation to cruelty that would mean, if section 176 (c) of the Act of 1925, as substituted by the Act of 1937, has really altered the law as regards divorce, that two different standards of cruelty as regards judicial separation are set up in the same sentence of the same subsection, one based wholly on past behaviour and the other on the need for protection for the future.

I must confess that until I read the argument in *Meacher v. Meacher*,⁶³ which went the length of submitting that "even if it be correct" (the italics are mine) "that the practice of the ecclesiastical courts and subsequently of the Divorce Court in granting judicial separation on the ground of cruelty was based wholly on the necessity for future protection, that is not the case under section 2 of the Matrimonial Causes Act, 1937, which . . . makes no reference to the likelihood of the cruelty continuing or to further cruelty at all," I had never seen or heard the suggestion that the words "has treated the petitioner with cruelty" in that Act had made any difference to the legal conception of cruelty. Nor do I understand why it should be so, merely because cruelty is now by itself a ground for divorce, whereas formerly it had to be coupled with adultery. What that conception is was settled by *Russell v. Russell*,⁶⁴ a case which, as appears from the judgments under appeal as well as from other Scottish decisions to which we have been referred, is evidently regarded as a leading case in Scotland as well as in England. But it is important to bear in mind that in determining⁶⁵ "what elements were treated as essential to the constitution of the saevitia, or cruelty, which entitled to a divorce," Lord Herschell was careful to point out that judges had not infrequently, when speaking of acts as "cruel," "used that word in its popular sense, and not as indicating that the acts were cruel in the

⁶³ [1946] P. 216, 217.

⁶⁵ Ibid. 445.

⁶⁴ [1897] A.C. 395.

“legal acceptance of the term—that is to say, such as would entitle to a divorce,”⁶⁶ and he quoted pronouncements both of Lord Stowell and of Sir John Nicholl in that sense to illustrate the risk of confusion arising from the use of the words “cruelty” and “cruel” in the popular sense. Therefore, when the legal conception of cruelty is described as being conduct of such a character as to cause danger to life, limb or health, bodily or mental, or to give rise to a reasonable apprehension of such danger, it is vital to bear in mind that it comprises two distinct elements: first, the ill-treatment complained of, and, secondly, the resultant danger or the apprehension thereof. Thus it is inaccurate, and liable to lead to confusion, if the word “cruelty” is used as descriptive only of the conduct complained of, apart from its effect on the victim.

There seem to me to be some traces of this confusion in *Meacher v. Meacher*.⁶⁷ For example, such phrases as “unless . . . such assaults are likely to continue,” “unless there is . . . a reasonable fear that further acts of cruelty will be committed,” are used to illustrate the rejection of the proposition that the court intervenes “only to protect the parties from what they expect to happen,” as if all these phrases necessarily expressed the same idea. But where, as in that case, a wife has withdrawn from cohabitation because a series of violent assaults has caused danger to limb and health, bodily and mental (for she had not only suffered bodily injuries but had had a nervous breakdown), the expectation of a renewal at least of the apprehension of danger to bodily or mental health, if she were called on to resume cohabitation, is not necessarily the same thing as the likelihood of the continuance of the actual assaults or even as the fear that further “acts of cruelty” will be committed. I say “if she were called on to resume cohabitation” because that test is common to both countries: see, for example, Lord Penzance in *Kelly v. Kelly*⁶⁸ and *M'Donald v. M'Donald*.⁶⁹ In my opinion it is indisputable that the twofold test was laid down in *Russell v. Russell*⁷⁰ because the majority, both in the Court of Appeal and in your Lordships' House, were satisfied that protection of the aggrieved spouse lay at the root of the matter. But protection from what? Not necessarily from a repetition of the whole course of ill-treatment, or even the same kind or degree of ill-treatment.

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⁶⁶ [1897] A.C. 395, 449.⁶⁹ 1939 S.C. 173.⁶⁷ [1946] P. 216, 218, 219.⁷⁰ [1895] P. 315; [1897] A.C. 395.⁶⁸ (1869) L.R. 2 P. & M. 31, 32.

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To use a homely metaphor, the camel needs protection from the last straw which is to break its back, or even from the penultimate straw which threatens to do so, and not only from being laden afresh with another whole bale of straw. That is why it may be confusing to speak of repeating "the cruelty." This is well illustrated by a recent case of *Cooper v. Cooper*,⁷¹ decided in your Lordships' House on March 29, 1950. Lord Jowitt L.C., in an opinion with which the other noble Lords concurred, said⁷²: "The more serious the original offence, the less grave need be the subsequent matters to constitute cruelty, for the subsequent acts must be looked at in the light of the earlier history from which they derive their significance," adding that if authority were needed for such an obvious proposition it was to be found in *Wilson v. Wilson*.⁷³ Both of these were cases in which, after the wife had left the matrimonial home because of earlier ill-treatment, cohabitation had been resumed. I would add that there have been many other decisions in the intervening century to the same effect, not only in cases where cohabitation has been resumed, but also where it has been continued until what may be called the imposition of the "last straw."

If I may say so respectfully, the Court of Appeal was bound to set aside a decision refusing a decree on the grounds, first, that the parties having separated, there was no likelihood of further cruelty, and, secondly, that the court would not intervene on behalf of a wife who could have put a stop to the cruelty by complying with the husband's unreasonable prohibition of visits to her sister. These reasons were manifestly unsound and conflicted in both respects with *Kelly v. Kelly*⁷⁴ and *Mackenzie v. Mackenzie*.⁷⁵ Moreover, there being ample evidence of conduct causing danger to limb or health and of the need for protection if cohabitation were to be resumed, the court was fully justified in drawing its own conclusion that cruelty was proved. But if it was also intended to decide that by reason of the wording of section 176 (c) of the Supreme Court of Judicature (Consolidation) Act, 1925, as substituted by section 2 of the Matrimonial Causes Act, 1937, it is no longer necessary, in a case where a spouse has withdrawn from cohabitation because of ill-treatment, to consider whether, if he or she were obliged to resume cohabitation, there

⁷¹ [1950] W.N. 200; 48 L.G.R. 377.

⁷² [1950] W.N. 200, 201; 48 L.G.R. 377, 379.

⁷³ (1849) 6 Moo.P.C. 484.

⁷⁴ (1869-70) L.R. 2 P. & M. 31, 59.

⁷⁵ [1895] A.C. 384.

would not at the least be a reasonable apprehension of danger to life, limb or health, bodily or mental, I feel bound to express my opinion that this is not the law of England. As regards *Dunlop v. Dunlop*,⁷⁶ on the other hand, I would only say that it is possible to share the scepticism expressed by Lord Jamieson⁷⁷ about the certainty, or the permanence, of the drunkard's somewhat rapid reformation without doubting that an English court, if it were fully satisfied that an aggrieved spouse could resume cohabitation without danger to life, limb or health, bodily or mental, or even a reasonable apprehension of such danger, would be bound in principle to arrive at the same conclusion.

Having already referred in passing to *Squire v. Squire*,⁷⁸ it only remains to say a word about *Lauder v. Lauder*,⁷⁹ the other decision of the Court of Appeal which, as we were given to understand, was thought by the majority below to represent an extension of the legal conception of cruelty. Here, again, let me say that I am not suggesting for a moment that this or any other English case is binding in Scotland, but whether the decision itself was right or wrong at least it can be said that there was no intention to make a departure from established principle. The case was determined in light of the decisions in *Kelly v. Kelly*,⁸⁰ *Mytton v. Mytton*,⁸¹ *Bethune v. Bethune*⁸² and *Moss v. Moss*.⁸³ *Meacher v. Meacher*⁸⁴ was not even mentioned in the argument. Also, it was expressly insisted that the case was one in which it was pre-eminently necessary to bear in mind the principles laid down in *Russell v. Russell*⁸⁵; but it was said⁸⁶ that in applying those principles it was impossible to doubt that if there had been evidence that the wife's conduct "had caused any injury to "mental health or a reasonable apprehension of such injury," the decision in the Court of Appeal and in the House of Lords must have been the other way. This distinction had already been drawn by Lord Low in *Aitchison v. Aitchison*⁸⁷ and by Jeune P. in *Jeapes v. Jeapes*.⁸⁸ Moreover, in *Duffy v. Duffy*,⁸⁹ Lord Jamieson referred without disapproval to Lord Low's judgment in *Aitchison v. Aitchison*.⁹⁰

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⁷⁶ 1950 S.C. 227.

⁷⁷ Ibid. 243.

⁷⁸ [1949] P. 51.

⁷⁹ [1949] P. 277.

⁸⁰ L.R. 2 P. & M. 31, 59.

⁸¹ (1886) 11 P.D. 141.

⁸² [1891] P. 205.

⁸³ [1916] P. 155.

⁸⁴ [1946] P. 216.

⁸⁵ [1897] A.C. 395.

⁸⁶ [1949] P. 277, 287.

⁸⁷ 1902, 10 S.L.T. 331, 332.

⁸⁸ (1903) 89 L.T. 74.

⁸⁹ 1947 S.C. 54, 64.

⁹⁰ 1902, 10 S.L.T. 331.

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To conclude, I also agree emphatically that the Act of 1938 does not in any way restrain the development of the law of cruelty as the foundation of actions of separation or of divorce. To refer once more to *Kelly v. Kelly*,⁹¹ the same thing was said in relation to English law in the judgment of Channell B. and Hannen J. in a passage which was quoted and followed by Lord Low in *Aitchison v. Aitchison*.⁹²

Like my noble friend, Lord Normand, I agree with the dissenting judgment of Lord Keith and would allow the appeal.

LORD REID stated the facts and continued:—My Lords, I read the appellant's averments as alleging a deliberate course of conduct intended to wound and humiliate the appellant and persisted in by the respondent although it was obvious that this was seriously affecting the appellant's mental and physical health. / It is true that the appellant's case does not appear to have been presented in this light to the First Division; the argument there presented appears to have been that any conduct by one spouse which injures the health of the other is cruelty whatever may have been the intention of the defender. I am not surprised that the First Division rejected this argument. But there can hardly be a more grave matrimonial offence than to set out on a course of conduct with the deliberate intention of wounding and humiliating the other spouse and making his or her life a burden and then to continue in that course of conduct in the knowledge that it is seriously affecting his or her mental and physical health. / Such conduct may consist of a number of acts each of which is serious in itself, but it may well be even more effective if it consists of a long-continued series of minor acts no one of which could be regarded as serious if taken in isolation. / Once it is established that physical violence is not a necessary ingredient of cruelty—and I think that that has long been recognized by the law of Scotland—then I can see no justification in principle for requiring that the deliberate acts of the defender must be of a certain character, and I know of no authority which requires me to make any such distinction. /

If a case is to be remitted for proof it is very undesirable to say anything which may embarrass the future conduct of the case. I do not think that it is necessary for the decision of this appeal

⁹¹ L.R. 2 P. & M. 59, 61.⁹² 1902, 10 S.L.T. 331.

to make a detailed examination of the authorities either in Scotland or in England, and I therefore refrain from doing so. But to avoid misunderstanding there are some observations of a general character which I think it necessary to make.

What I have said is only intended to apply when a deliberate intention such as I have described was the cause of the defender's conduct. Such an intention need not be proved by direct evidence; it may be inferred from the whole facts and atmosphere disclosed by the proof. I do not doubt that there are many cases where cruelty can be established without it being necessary to be satisfied by evidence that the defender had such an intention, but I do not intend to decide anything about such cases. / If the defender did not in fact intend to ill-treat the pursuer, / I desire to reserve my opinion whether, or to what extent, it is necessary or proper to impute an intention which did not exist by invoking a legal presumption that everyone must be supposed to intend or foresee the natural and probable consequences of his acts, and I also wish to reserve my opinion on the question whether or in what circumstances it can be enough in such cases to prove that a series of comparatively minor incidents has caused injury to the health of the pursuer if the defender was not guilty of deliberately ill-treating the pursuer. /

In view of certain observations of the Lord President, I think that I must express my opinion on the question whether there is any difference between the law of Scotland and the law of England as to what the law regards as cruelty. I take the question in two stages. Down to 1937 I can find no difference in principle as to what is cruelty for the purpose of separation a mensa et thoro. English cases were copiously cited by Scottish judges and Scottish text writers of authority, and citation of Scottish cases in England was by no means infrequent. It would be somewhat strange if it were otherwise, looking to the similar origin of the law in the two countries. That is not to say that there were not differences from time to time in the way in which established principles were applied, but that is a feature of a developing system of law, and indeed, human nature being what it is, different judges applying the same principles at the same time in the same country to similar facts may sometimes reach different conclusions. In 1937 cruelty became a ground for divorce in England, and in 1938 it became a ground for divorce in Scotland. The two enactments are in different terms and questions have arisen out of this difference, but I do not recollect

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that anyone has suggested that either enactment altered the established principles by which it must be determined what is sufficient and what is not sufficient to justify a finding of cruelty, and I see nothing in any enactment to require the Scottish courts to depart from established principles or indeed to authorize them to do so. Equally I see nothing to prevent the Scottish courts from developing the application of those principles in the same way as development takes place in other branches of the common law.

Finally, I do not think that the decision of your Lordships in this case should be taken as casting any doubt on the value of the Scottish procedure of disposing of suitable cases on relevancy without inquiring into the facts, or on the applicability of that procedure to consistorial cases. If it can be shown that, even if the pursuer succeeds in proving all that he avers, still his case must fail, it appears to me to be highly advantageous that time and money should not be spent on fruitless inquiry into the facts, and this appears to me to be no less advantageous in consistorial cases. But there is this difference between these cases and others: in many of these cases the whole history of the marriage and the demeanour of the witnesses may be specially important when it comes to assessing the bearing of particular facts, and therefore, before a pursuer's averments are held to be irrelevant, it must be clear that, even if the proof discloses an atmosphere wholly favourable to the pursuer, the pursuer's case would still fail. But if that is clear, as it may be even where cruelty is alleged, then I think that it is proper to dispose of the case on relevancy.

I agree that this appeal should be allowed.

LORD TUCKER. My Lords, judges have always carefully refrained from attempting a comprehensive definition of cruelty for the purposes of matrimonial suits, and experience has shown the wisdom of this course. It is in my view equally undesirable—if not impossible—by judicial pronouncement to create certain categories of acts or conduct as having or lacking the nature or quality which render them capable or incapable in all circumstances of amounting to cruelty in cases where no physical violence is averred.

Every such act must be judged in relation to its attendant circumstances, and the physical or mental condition or susceptibilities of the innocent spouse, the intention of the offending spouse and the offender's knowledge of the actual or probable

effect of his conduct on the other's health (to borrow from the language of Lord Keith⁹³) are all matters which may be decisive in determining on which side of the line a particular act or course of conduct lies.

For this reason I agree with Lord Keith⁹⁴ that it is, generally speaking, not possible "to compartment acts for purposes of "relevancy as being gross, so as to constitute cruelty, or less "gross, so as not to constitute cruelty," though there may be extreme cases where the acts in themselves are so trivial as to justify dismissal of an action for lack of relevance without proof. It is with regard to the sufficiency of the facts and matters relied on as amounting in the aggregate to cruelty that I think consistorial causes are so different from many other types of action, though I agree with counsel for the respondent that it would be wrong to say that no such suit could ever fail for lack of relevance.

My Lords, in the present instance I think that the averments of knowledge, intention and persistence remove this case from the area of doubt in which it might otherwise have lain in the absence of such averments.

I agree, for the reasons which have been stated by my noble and learned friend, Lord Merriman, that there has been no change in the law of England with regard to cruelty consequent upon the passing of the Matrimonial Causes Act, 1937, and, this being so, I can find no difference between the law of Scotland and England in this respect. I also agree with his observations on the case of *Meacher v. Meacher*.⁹⁵ For these reasons I agree that this appeal should be allowed.

Appeal allowed.

Solicitors: *Burton & Ramsden, for Balfour & Manson, S.S.C., Edinburgh; Reid, Sharman & Co., for Steedman, Ramage & Co., W.S., Edinburgh.*

⁹³ 1951 S.C. 286, 300.

⁹⁵ [1946] P. 216.

⁹⁴ *Ibid.* 299.

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Revenue—Income tax—Income from foreign possessions—Taxpayer's bank account in Ceylon—Overdrafts at United Kingdom branch—Transfer to Ceylon for discharge—Income Tax Act, 1918 (8 & 9 Geo. 5, c. 40), Sch. D, Case V, r. 2.

A partner in a firm carrying on business in Ceylon became resident in England and arranged for an overdraft without security with the English office of the bank at the Ceylon branch of which he already had an account, his receipts from the firm being paid into that account. He authorized the transfer of the overdraft from time to time to the Ceylon branch, where the debt created in London was met by payments in from the firm and discharged.

Held, that he was not chargeable to income tax under rule 2 of Case V of Sch. D of the Income Tax Act, 1918, in amounts corresponding to the sums advanced in England inasmuch as there were no "remittances" of income to the United Kingdom from Ceylon; all his income receipts were received in Ceylon, while the moneys received in London were advances of capital.

Trinidad Lake Asphalt Operating Co. Ltd. v. Income Tax Commissioners for Trinidad and Tobago [1945] A.C. 1 considered and distinguished.

Decision of the First Division of the Court of Session, 1950 S.C. 353 affirmed.

APPEAL from the First Division of the Court of Session.

The facts, stated by Lord Cohen, were as follows:—This appeal related to additional assessments to income tax made upon the respondent under Case V, Sch. D, of the Income Tax Act, 1918, to cover income alleged to be chargeable under rule 2 of the Rules applicable to the said Case.

The respondent was at all material times senior partner in a firm carrying on business in Ceylon. He had a bank account with the Colombo branch of the National Bank of India (hereinafter referred to as "the bank"), which had its head office in London. Prior to the war he made periodic visits from Ceylon to this country and he was here in 1940 on a visit. Owing to the war he was unable to return to Ceylon and had to reside in this country until the termination of the war. He thus found himself in the

* *Present*: LORD NORMAND, LORD MORTON OF HENRYTON, LORD TUCKER and LORD COHEN.

position in the years now in question that, being a British subject, he was unable to satisfy the Commissioners that he was not ordinarily resident in the United Kingdom: see rule 3 of the Rules applicable to Case V.

Some time prior to January 2, 1942, the respondent opened an account with the head office of the bank, and between that date and March 4, 1942, the account remained in credit. On or about that date the respondent made an oral arrangement with the bank in London whereby they allowed him, without giving any security, to overdraw his account with the head office, and the head office arranged to transfer portions of his overdraft to the Colombo branch. The Colombo branch debited the respondent's account with the equivalent in rupees of the said transfers and the respondent arranged to pay rupees into the branch account to meet such debits.

Originally no arrangement was made as to when such transfers of overdraft should be made, but in September, 1942, correspondence was exchanged between the London office of the bank and the respondent, the effect of which was to provide that whenever the figure reached £500 the overdraft should be transferred to Colombo.

The respondent first became overdrawn on March 4, 1942. Thereafter operations on the banking account were made in accordance with the arrangements already stated. Excerpts of the accounts in Colombo and London were annexed to the case stated. These excerpts recorded three transactions from Colombo to London which it was admitted were chargeable under rule 2. They were as follows (taking the dates from the excerpts of the London account and giving the amount in sterling):—

February 2, 1942	...	...	...	£1,428	12	8
May 23, 1942	...	...	...	£1,999	12	5
November 23, 1943	...	...	...	£600	0	0

The excerpts also recorded six transfers from London to Colombo, the amounts of which it was unnecessary for the purposes of this case to set out in full. They represented what the parties agreed were "transfers of overdraft." They differed only in this, that, as appeared from the excerpts from the Colombo account, three of them were made at a time when the balance to the credit of the Colombo account was not sufficient to wipe out the overdraft transferred. In these cases the debits were apparently met by payments in of rupees to the Colombo account. There was, however, sufficient to the credit of the Colombo

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H. L. (Sc.) 1952 account to meet the other three transfers at the dates when they were respectively made.

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Interest was allowed by the bank on credit balances and was charged on debit balances of each of the accounts in Colombo and London. The case stated did not state whether or not interest was allowed and charged at the same rate in Colombo and in London.

On an appeal by the present respondent, the Commissioners for the Special Purposes of the Income Tax Acts gave their decision as follows: "In principle we are unable to distinguish this case from *Hall v. Marians*.¹ We hold that in the circumstances proved before us no sums of income from possessions outside the United Kingdom have been remitted to the appellant in the United Kingdom. We therefore allow the appeal." In the case stated they set out the questions for the opinion of the court as follows: "(1) Were the Commissioners entitled to hold that no sums of income from possessions outside the United Kingdom were remitted to the respondent in the United Kingdom? (2) Whether on the facts stated the respondent was assessable under Case V, rule 2 of Sch. D to the extent that the sums in the Colombo account used to repay the bank consisted of income? and, if so, (3) whether there was a remittance within the meaning of the said rule 2 (a) each time the respondent drew money in London, or (b) when the London drawings were repaid to the bank in Colombo?" The First Division of the Court of Session answered question (1) in the affirmative and question (2) in the negative. The Crown appealed to the House of Lords.

J. Millard Tucker Q.C. and *Sir Reginald Hills* (both of the English Bar) and *Shearer* (of the Scottish Bar) for the Crown. The question is whether there were "remittances" of income to the United Kingdom, or alternatively whether the transactions resulted in sums annually received in the United Kingdom from money or value as set out in rule 2 of Case V of Sch. D to the Income Tax Act, 1918. The sums may be, moreover, from "money or value arising from property not imported."

Where a remittance is clearly proved to have come entirely out of capital there is no sum which falls within Case V. Annual sums must represent income before they are taxable: see *Kneen v. Martin*²; *Duke of Roxburghe's Executors v. Inland Revenue*

¹ (1933) 18 Tax Cas. 148; (1935) 19 Tax Cas. 582.

² [1935] 1 K.B. 499.

*Commissioners*³ and *Scottish Provident Institution v. Allan*⁴; H. L. (Sc.) see also *Patuck v. Lloyd*,⁵ which shows that in order to be taxable a remittance of income need not occur in the same year of assessment as the year in which that income was first received by the taxpayer. In order to render the taxpayer liable to tax the remittances need not be received by him himself. The actual payment may be to someone by his direction and that is enough: see *Timpson's Executors v. Yerbury*.⁶ However, he will not be liable if the cheque or other instrument or thing constituting the remittance has ceased to be his property before it reaches the United Kingdom: see *Carter v. Sharon*.⁷ There may be a remittance of income although at its date the account of the taxpayer abroad through which it was passed was already overdrawn: see *Fellowes-Gordon v. Inland Revenue Commissioners*.⁸

*Hall v. Marians*⁹ is distinguishable from the present case. There the real legal position was that the bank in Colombo made a new loan in rupees which was converted into sterling and transferred to Mrs. Marians in London; over a period of years she raised a series of capital loans in the United Kingdom on the security of capital investments abroad. That case was followed in *Wild v. King Smith*.¹⁰ The observations of Romer L.J. in *Hall v. Marians*¹¹ are important, indicating as they do that if the hypothesis there stated had been actual fact he would have decided the matter the other way. Should it be held that in principle these cases are indistinguishable from the present case, then they were wrongly decided and should be reconsidered.

It is important to note that in the present case the accounts in Colombo and in London were with the same bank. As to a bank's power to amalgamate the accounts of a customer, see *Garnett v. M'Kewan*¹²; *James Kirkwood & Sons v. Clydesdale Bank Ltd.*¹³; *Buckingham & Co. v. London and Midland Bank*¹⁴ and *W. P. Greenhalgh & Sons v. Union Bank of Manchester*.¹⁵ The last was merely a decision on an implied agreement not to amalgamate them. A customer cannot draw any money save at the branch where his account is kept, but the bank may be able to claim a sum due from the customer wherever it likes to sue for it. A demand by a customer for money from a bank must

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³ 1936 S.C. 863; 20 Tax Cas. 711.

⁴ [1903] A.C. 129.

⁵ (1944) 171 L.T. 340; 26 Tax Cas. 234.

⁶ [1936] 1 K.B. 645, 659-60.

⁷ (1936) 20 Tax Cas. 229.

⁸ (1935) 19 Tax Cas. 683.

⁹ 19 Tax Cas. 582.

¹⁰ (1941) 24 Tax Cas. 86.

¹¹ 19 Tax Cas. 582, 600.

¹² (1872) L.R. 8 Ex. 10.

¹³ 1908 S.C. 20.

¹⁴ (1895) 12 T.L.R. 70.

¹⁵ [1924] 2 K.B. 153.

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be made at the branch where the account is kept before he can sue the bank, but if the demand is made at that branch and is refused the bank can be sued anywhere, e.g., in the country where its head office is, even if it is different from the country where the branch is. As to the demand of the customer for payment, see *N. Joachimson v. Swiss Bank Corporation*.¹⁶ As to the implied promise of the bank to repay a credit balance only at the branch where the account is kept, see *Richardson v. Richardson*¹⁷ and *Clare & Co. v. Dresdner Bank*.¹⁸ In *Prince v. Oriental Banking Corporation*¹⁹ it was held that "the position of a branch bank is that in principle and in fact they are agencies of one principal banking corporation or firm," not two separate entities. The position in the present case is the same as if the taxpayer had had two accounts at the same bank, a No. 1 and a No. 2 account. The substance of the transaction is that the bank lends the taxpayer money in London on the credit that he will repay it in Ceylon. The payment discharges a debt which never ceased to be a debt to the bank. The payment into the bank in Colombo did in fact discharge the original debt incurred in London; it was not a different debt.

As in *Trinidad Lake Asphalt Operating Co. Ltd. v. Income Tax Commissioners for Trinidad and Tobago*,²⁰ the transaction must be looked at from both ends. Its reasoning should be applied and it is inconsistent with that of the court below.

The taxpayer here has increased his assets in this country by reducing his liabilities, and although this was achieved by means of a payment abroad it falls within the words of Case V, which is the old Case V of Sch. D in section 100 of the Income Tax Act, 1942. It is designed to cover any income arising from foreign possessions of which the taxpayer may be said to have the benefit in this country. The effect of borrowing, say, £500 in London, and then transferring the debt to Colombo, where there is already money to cover it, amounts to a receipt in London: see the *Trinidad Lake* case.²⁰ The acknowledgment that the bank will pay to the taxpayer in London £x whenever he has that amount in his account at Colombo is a remittance; it is a payment in London with the aid of funds in Colombo, because the money has in effect been remitted to London to satisfy his debt there. On the occasions when the overdraft in London was transferred to Colombo at a time when there was not enough money in the Colombo account

¹⁶ [1921] 3 K.B. 110.¹⁷ [1927] P. 228.¹⁸ [1915] 2 K.B. 576.¹⁹ (1878) 3 App.Cas. 325.²⁰ [1945] A.C. 1.

to meet it, though later sufficient money was paid in, the facts amounted to the receipt of money by the taxpayer in London, where he borrowed it on credit of future income which was to discharge what was borrowed.

The result of the arrangement was that the taxpayer received in the United Kingdom actual sums representing, in whole or in part, his share of profits from his business in Ceylon. Though this was achieved by cross-entries between the London office and the Colombo branch, the effect was to put him in actual receipt in the United Kingdom of a share of those profits which were at his disposal during his absence from Ceylon. Over-much emphasis should not be laid on the fact that the debit due by him in London was settled by an arrangement which involved payment of actual money in Colombo. The arrangement was acceptable to the bank and its result was that a debt incurred in London by the taxpayer was discharged out of his foreign income, even though the bank, for domestic reasons, might or might not on the occasion of each discharge have remitted actual cash from Colombo to London.

Sir Reginald Hills following. It may be said that the Crown is here contending for a constructive receipt of money, but money need not be received in the specific form of currency. When a company declares a dividend of, say, £100,000, that does not mean that that amount of cash is available; it is referable to profits. In the enactment here in question the draftsman has given his mind to half a dozen ways in which money abroad may be enjoyed by someone in the United Kingdom. The appropriate charging words of Sch. D charge tax on profits or gains from foreign possessions. Here the taxpayer has lived in the United Kingdom for several years. He had no income here and he lived on his foreign income in this country. In every practical sense he had his income and spent it here. He was getting in advance the enjoyment of something not yet in existence as English money but anticipated. As soon as you have a debt here extinguished you have value here.

The third question in the case stated is purely hypothetical and need not be answered by the House.

Keith Q.C., *Maxwell* and *Margaret MacIntyre* (all of the Scottish Bar) for the respondent taxpayer. The respondent remitted none of the income from Colombo to within the United Kingdom and so the transactions do not come within rule 2. Under rule 2 the assessment is made on a remittance basis. The taxpayer is not liable to income tax in the United Kingdom in respect of income from his firm in Ceylon provided he receives

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no income in the United Kingdom in respect of it. The rule is directed to prescribing the measure of liability to tax in respect of income from foreign possessions and fixes that liability at "the full amount of the actual sums annually received in the United Kingdom." It postulates a receipt of income in the United Kingdom and a remittance of income to the United Kingdom. The facts proved do not come within the terms of the rule. The respondent received a loan. It is common ground that it was not a sum received from "property imported." Further, it had nothing to do with "property not imported"; there was no money or value arising in the United Kingdom from such property. The first and the last sources specified in the rule are the only ones that could apply and in order to come within these (1) there must be sums of income received in the United Kingdom, and (2) they must be received either from "remittances payable in the United Kingdom" or from money or value received on credit or on account of remittances payable in the United Kingdom. But the facts of the present case do not clearly come within this enactment. The general principle of the construction of a taxing statute applies to this rule; it is necessary to have words which clearly bring the subject within the tax. The question is always: Is the transaction fairly and squarely hit by the words according to their natural meaning? It is for the Crown to show that the case comes within the words of the Act: see *St. Aubyn v. Attorney-General*.²¹

There never was a remittance of the respondent's income from Colombo to the United Kingdom, and the Crown's argument depends on there having been such a remittance from which the benefit is derived, an actual receipt of income, not necessarily in cash, through the remittance. To say that there must be something equivalent to a remittance is unsound, ignoring the actual words of the rule.

There was a loan in London. No source of repayment was stipulated. The money was received in London and repaid to the bank in Colombo. No remittance was made and the transaction was concluded. The debt was extinguished in Colombo, not by a transfer of money. The effect of transferring the overdraft to Colombo was merely machinery whereby the bank gave effect to the agreement to accept payment there. It is wrong to talk of a London debt being extinguished; there was a debt to the bank which from the beginning was to be repaid in Ceylon.

²¹ Ante, 15, 32.

Even if it was a London debt, that is not material. The question is: How was it extinguished? There was no remittance when money was paid into the bank in Colombo because the debt was then extinguished. In the cases when the account in Colombo had enough funds to extinguish the overdraft when it was transferred there was no remittance in fact. In principle there is no distinction between that case and the case where the overdraft was transferred when the Colombo account was in credit and the case where the overdraft transferred was subsequently discharged by the payment in of funds. In both cases the debt was discharged in Colombo. Thus there was no remittance of the respondent's income at any stage to the United Kingdom.

The sums received by the respondent in London were not income. They were not received on the credit of a future remittance. He created a debt due from him to the bank and when he received the money it was not a remittance from Colombo. His accounts in London and Colombo were separate. When the overdraft was transferred to the debit of the latter account there was no remittance.

There was evidence to support the view taken by the Special Commissioners and their finding should not be disturbed.

From *Hall v. Marians*²² it appears that payment into an account in Colombo is not a receipt in the United Kingdom. The case was correctly decided, though not on the right grounds, by Romer L.J. The facts, though not identical with those of the present case, are not different in any material respect. *Wild v. King Smith*²³ follows that decision and adds nothing to it.

In *Fellowes-Gordon v. Inland Revenue Commissioners*²⁴ the question was whether the remittance was income or capital; it does not carry the matter any further.

As to *Trinidad Lake Asphalt Operating Co. Ltd. v. Income Tax Commissioners for Trinidad and Tobago*,²⁵ that case is quite different on the facts from the present case.

[They also referred to *Timpson's Executors v. Yerbury*²⁶; *Carter v. Sharon*²⁷ and *Gresham Life Assurance Society Ltd. v. Bishop*.²⁸]

It is admitted that all the accounts have to be adjusted in respect of certain sums remitted to the United Kingdom.

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²² 18 Tax Cas. 148; 19 Tax Cas. 582, 598, 604.

²³ 24 Tax Cas. 86.

²⁴ 19 Tax Cas. 683.

²⁵ [1945] A.C. 1.

²⁶ [1936] 1 K.B. 645.

²⁷ 20 Tax Cas. 229.

²⁸ [1902] A.C. 287, 290, 296.

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Tucker Q.C. in reply. It is said that when the taxpayer was drawing on the London account by way of overdraft he was merely borrowing money. But the bank is one single persona. It is meaningless to speak of transferring an overdraft. An overdraft in the eyes of the person who has incurred it is a negative thing. If at point A on my land a hole is dug and I tell the gardener to transfer it to point B, he digs another hole but he does not transfer the old hole. All that transferring this overdraft means is that the bank will receive payment in Colombo. The taxpayer is de facto in England. If he has funds in Colombo at the time, the facts are exactly the same as in the *Trinidad Lake* case.²⁹ Thus the set-off imports (a) that the money is a sum actually received by the taxpayer in the United Kingdom, and (b) that it comes from a remittance to the United Kingdom. Physically the taxpayer was in England and the money was received there. When the Colombo account was in debit at the time of the overdraft the bank agreed to accept payment in rupees in Colombo instead of in sterling. That was equivalent to the remittance of money to the United Kingdom. The money so received in the United Kingdom amounted to income.

Their Lordships took time for consideration.

March 25. LORD NORMAND. My Lords, I have had the advantage of reading in print the opinion about to be delivered by my noble and learned friend, Lord Cohen. I agree with it in omnibus, and have nothing to add.

LORD MORTON OF HENRYTON. My Lords, I also have had the advantage of reading in print the opinion which is about to be delivered by my noble and learned friend, Lord Cohen. Subject to the reservation which I am about to mention, I entirely agree with that opinion. I desire, however, to reserve for a future occasion any consideration of the meaning and effect of the words "the actual sums annually received in the United Kingdom . . . from money or value arising from property not imported" which appear in rule 2 of the Rules applicable to Case V, Sch. D of the Income Tax Act, 1918. Mr. Tucker did not rely on these words as being applicable to the present case, and consequently your Lordships did not have the advantage of hearing any argument as to their meaning. For this reason I find myself unable either

²⁹ [1945] A.C. 1.

to agree or to disagree with the views expressed by my noble and learned friend as to the meaning of those somewhat obscure words.

I agree with the motion proposed.

LORD TUCKER. My Lords, in this case I have had the advantage of reading in print the opinion which is to be delivered by my noble and learned friend, Lord Cohen, in which the relevant facts and the words of rule 2 of Case V, Sch. D of the Income Tax Act, 1918, are fully set out, and I therefore need not repeat them. I am in complete agreement with the reasoning by which he has arrived at the conclusion that the Crown has failed to bring this case within the first or fourth sources of income referred to in rule 2, viz., (1) "remittances payable in the United Kingdom," and (2) "money or value so received on credit or on account in respect of any such remittances, property, money, or value brought or to be brought into the United Kingdom."

In my view, the transaction in the present case consisted of a loan or loans granted in London on the express terms that the debt or debts thereby created were to be repayable only in Ceylon where they have been in fact repaid. That the loans produced "actual sums . . . received in the United Kingdom" is not in dispute, but such sums were not derived from remittances payable in the United Kingdom, nor were they derived from money or value received in the United Kingdom on credit or on account in respect of such remittances. There was no evidence that any moneys were ever remitted from Ceylon to London in connexion with the loans and, even if the Colombo branch did remit to head office in London, they would have been dealing with the bank's own moneys.

My Lords, I do not question the proposition that there may be remittances within the rule as a result of appropriate book entries without the transfer of bullion or negotiable instruments, but I share my noble friend's difficulty in following the reasoning of the judgment of the Privy Council in the case of *Trinidad Lake Asphalt Operating Co. Ltd. v. Income Tax Commissioners for Trinidad and Tobago*³⁰ in so far as the conclusion was reached that a settlement of cross-accounts by appropriate book entries in Trinidad amounted to a transmission of money to a non-resident outside the colony. That there was a transmission to a non-resident, which would seem to have been sufficient for the decision,

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³⁰ [1945] A.C. 1.

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is, I think, clear, but that it was a transmission to New York where the non-resident resided I find difficulty in understanding, and I do not feel able to apply the reasoning in that case to the facts in the present case to the extent of holding that each time the debt incurred in London was transferred to Colombo, and satisfied by the taxpayer in that place by money standing to his credit or subsequently paid in, it resulted in law in a remittance to him in the United Kingdom.

I only desire to add a few words with regard to the third source in rule 2, viz., "money or value arising from property not imported." This does not seem to have figured prominently, if at all, in argument before the Special Commissioners or in the Court of Session, but it was to some extent relied on by the Crown in your Lordships' House.

I do not think that the sums received by every loan in the United Kingdom can be said to have been received from money or value arising from property not imported. I find it difficult to ascertain of what the money or value consisted, and in any event the mere fact that it was contemplated that the loans would eventually be repaid out of the profits of a business conducted in Ceylon would not in my opinion make the source money or value arising from property not imported. I would prefer to reserve the question whether the "money or value arising from property not imported" must itself be brought into the United Kingdom.

For these reasons I would dismiss this appeal.

LORD COHEN stated the facts and continued: My Lords, at this stage it will be convenient for me to set out the provisions of rule 2 on the construction of which the questions at issue between the parties depend. It provides as follows: "The tax in respect of income arising from possessions out of the United Kingdom, other than income to which rule 1 applies, shall be computed on the full amount of the actual sums annually received in the United Kingdom from remittances payable in the United Kingdom or from property imported, or from money or value arising from property not imported, or from money or value so received on credit or on account in respect of any such remittances, property, money, or value brought or to be brought into the United Kingdom, on an average of the three preceding years as directed in Case I, without any deduction or abatement other than is therein allowed." (The three years average basis is not now applicable.)

It will be observed that to bring this rule into operation the sums received in the United Kingdom must be derived from one of the four specified sources, viz.: (a) Remittances payable in the United Kingdom; (b) Property imported; (c) Money or value arising from property not imported; (d) Money or value so received on credit or on account in respect of any such remittances, property, money or value brought or to be brought into the United Kingdom.

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Before the Special Commissioners the dispute between the parties was whether the transactions to which I have referred amounted to an arrangement for the remittance of money to this country from Colombo. The Commissioners considered they were bound by the case of *Hall v. Marians*³¹—the facts in which case they regarded as indistinguishable from the facts in the case before them—to hold that no sums of income from possessions outside the United Kingdom had been remitted to the then appellant (the present respondent) in the United Kingdom. They therefore allowed the appeal and discharged the additional assessments. They stated the questions for the opinion of the court as follows:—“(1) Were the Commissioners entitled to hold that no sums of income from possessions outside the United Kingdom were remitted to the respondent in the United Kingdom? (2) Whether on the facts stated the respondent was assessable under Case V, rule 2, of Sch. D to the extent that the sums in the Colombo account used to repay the bank consisted of income? and, if so, (3) Whether there was a remittance within the meaning of the said rule 2—(a) each time the respondent drew money in London, or (b) when the London drawings were repaid to the bank in Colombo?”

When the case came before the First Division of the Court of Session they reached the conclusion that question (1) should be answered in the affirmative and question (2) in the negative, with the result that they affirmed the decision of the Special Commissioners, and question (3) did not arise.

Before us the dispute was finally concentrated on the question whether the appellants could bring their claim within the first or fourth of the sources specified in rule 2. It was common ground that there had been no property imported which could bring the second source into consideration. At one time Mr. Tucker, who appeared for the appellants, suggested that it might be said that there were sums received in the United Kingdom

³¹ 19 Tax Cas. 582.

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from "money or value arising from property not imported," but I think that he ultimately recognized that it was impossible to bring this case within the third source without grossly distorting the language used and, in particular, without placing on the word "from" a meaning which it could not properly bear.

There might have been another difficulty in Mr. Tucker's way had he persisted in this argument. To succeed on it, it would have been necessary for him to satisfy us that "the money or "value arising from property not imported" need not itself be brought into the United Kingdom. It is plain from the wording of the rule that sums cannot be said to be received in the United Kingdom from the first, second or fourth sources unless the source was itself payable in, imported into, or brought or to be brought into the United Kingdom. It would be strange if the sums received in the United Kingdom from the third source were within the rule although the money or value was not imported or to be imported into the United Kingdom. It would be all the more strange since sums received in the United Kingdom from the fourth source—i.e., "money or value so received on credit "or on account or in respect of . . . *such* money or value" (i.e., the third source)—could not bring the rule into operation unless *such* money or value had been brought or was to be brought into the United Kingdom. I incline, therefore, to the view that to succeed under the rule in respect of sums received from the third source the Crown must establish that the money or value had been brought or was to be brought into the United Kingdom.

Before I deal with the question whether, on the facts of this case, it can be said that the sums received by the respondent in the United Kingdom were received from the first or fourth source indicated in the rule, I may usefully mention certain matters arising on the construction of rule 2 which, as Mr. Tucker pointed out, are clearly established by authority. Thus:

(1) To attract tax, remittances must be remittances of income not capital: see *Kneen v. Martin*.³²

(2) Remittances may render the taxpayer liable to tax although the actual payment is not to the taxpayer but to someone by his direction (see *Timpson's Executors v. Yerbury* ³³); but,

(3) not if the cheque or other instrument or thing constituting the remittance has ceased to be the property of the taxpayer before it reaches this country: see *Carter v. Sharon*.³⁴

³² [1935] 1 K.B. 499.³³ [1936] 1 K.B. 645.³⁴ 20 Tax Cas. 229.

(4) The remittance may be a remittance of income notwithstanding that at the date of the remittance the account of the taxpayer abroad through which the remittance was passed is already overdrawn: see *Fellowes-Gordon v. Inland Revenue Commissioners*.³⁵

With these propositions in mind I turn to the argument that was addressed to us, that the amounts in question in this appeal were received from remittances payable in the United Kingdom within the first source or from money or value received within the fourth source.

As I have already said, both the Commissioners and the First Division of the Court of Session regarded the case as concluded against the appellants by the decision of the Court of Appeal in England in *Hall v. Marians*.³⁶ That case came before the Commissioners and the court on two separate occasions. As the facts were the same on both occasions and only the contentions differed, it will be sufficient if I refer to the second case which, unlike the first, went to the Court of Appeal. I take the facts from the headnote: "The respondent's wife, who lived with her husband " in London, was entitled to a share of the profits of a business " carried on in Colombo. Her share was paid into her current " account with the Colombo branch of a bank which was registered in the United Kingdom and had its head office in London. " On her instructions these profits were invested in Indian bonds. " The respondent's wife had from time to time borrowed certain " sums from the bank in London on the security of the bonds. " On April 1, 1930, she requested the bank in London to instruct " its Colombo branch to sell sufficient securities to extinguish the " loan. On the next day the bank informed her that the amount " of her loan account (with interest) was being debited to the " Colombo branch which was being instructed to realize securities " to pay it off. The transfer was effected by cross entries in the " books of the two offices, the entry in the London books being " dated April 3, 1930. A small credit balance in Colombo was " thereupon converted into an overdraft on which interest was " chargeable. A few weeks afterwards the overdraft and the " interest accrued thereon were discharged in Colombo out of the " proceeds of the sale of Indian bonds."

On those facts the Crown claimed income tax in respect of the amount of the overdraft transferred from the London office

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³⁵ 19 Tax Cas. 683.³⁶ 18 Tax Cas. 148; 19 Tax Cas. 582.

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of the bank to the Colombo branch. The Commissioners decided in favour of the respondent. Finlay J. allowed the appeal, but the Court of Appeal unanimously restored the decision of the Commissioners.

As the Lord President pointed out in the court below,³⁷ it is difficult to disentangle a single ratio decidendi from the judgments of the three members of the court. Lord Hanworth M.R.³⁸ based his decision on the conclusion that there was clearly no actual remittance and, as he thought, nothing which amounted to a remittance in any form or in any value. Romer L.J.³⁹ thought that there was a remittance, but that it was a remittance of capital and not income. Maugham L.J.⁴⁰ agreed with Romer L.J. that if it was a remittance it was a remittance of capital but, as I read his judgment, based his conclusion primarily on his acceptance of a contention advanced on behalf of Mr. Marians and recorded in paragraph 9 (b) of the case stated as follows⁴¹: “That the loans owing to the National Bank of India in London “had not been paid off by means of any remittances actual or “constructive but that in substance and in fact there had been “a series of capital advances in London charged on Indian “securities in Ceylon and that the loans had been converted into “a debt payable in Colombo with different incidents from those “which had attached when the debt was payable in London.”

I respectfully agree with the reasoning of Maugham L.J. There is this difference between the facts of the two cases, that there is no evidence in the present case that there were different incidents attached to the debt in Colombo from those which attached to the debt when it was payable in London. I do not, however, think that this difference in incidents necessarily leads to a different conclusion. It merely removes one piece of evidence supporting the conclusion that the loans in London had not been paid off by remittances from Ceylon.

There was this further distinction in fact between the two cases, that in *Hall v. Marians*⁴² the respondent's husband had hoped to discharge his wife's indebtedness in London (see paragraph 7 of the case stated⁴³), whereas, in the present case it was never contemplated that the debt should be repaid except in Colombo. I do not, however, think this affects the matter.

³⁷ 1950 S.C. 353, 362.³⁸ 19 Tax Cas. 582, 598.³⁹ Ibid. 602.⁴⁰ Ibid. 605.⁴¹ Ibid. 586.⁴² 19 Tax Cas. 582.⁴³ Ibid. 585.

Mr. Tucker relied on a passage in the judgment of Romer L.J. where he said ⁴⁴: "Had the bank in this country allowed her" (Mrs. Marians) "to draw the £440 on account or in advance or in respect of sums of money that they were expecting to receive in the future from the bank in Colombo, representing income from her foreign possessions, the matter would have been different, but, as I understand it, this money, the money that she was allowed to draw from the bank, was a loan from the bank in its strict sense, and that is found as a fact by the Commissioners in paragraph 7 of the stated case." Mr. Tucker read this passage as meaning that if the stated hypothesis had been actual fact, Romer L.J. would have decided the case in the opposite way. Romer L.J. does not express a concluded opinion but I think it is a fair inference that he would have done so. Even so, I do not think his observations help Mr. Tucker, since in the present case I am unable to trace any finding of fact that the bank in England ever made the loan on account of or in advance or in respect of money of the respondent representing income which the bank were expecting to receive in England from the branch in Colombo.

We have to decide this case on its facts, but I agree with the judges of the First Division that it is difficult to distinguish the case before us in any material respect from *Hall v. Marians*.⁴⁵

Mr. Tucker laid some stress on the fact that the accounts in Colombo and London were with the same bank in the case before us. So they were in *Hall v. Marians*.⁴⁵ I do not think this fact can relieve the court of the burden of deciding whether or not there was a remittance of income to London. The solution of this question depends, in my opinion, on the effect of the agreement that the London overdraft should be transferred to Colombo. I agree with Lord Keith that the only sensible meaning that can be given to that agreement is that the debt created in London was to be repaid in Colombo.⁴⁶ If that be the correct meaning, it seems to me that when the debt was repaid, whether out of moneys standing to the credit of the Colombo account at the date the entries in the books were made, or out of moneys subsequently paid into the Colombo account, the rupees applied in repayment became the property of the bank in Ceylon. There is no evidence whether they were remitted to London or not, but assuming they were remitted, they had previously become the

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⁴⁴ 19 Tax Cas. 582, 600.⁴⁶ 1950 S.C. 353, 363.⁴⁵ Ibid.

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property of the bank and could not be said to be property of the respondent. The case would, therefore, fall within *Carter v. Sharon*⁴⁷ and not within *Timpson's Executors v. Yerbury*.⁴⁸

Mr. Tucker says that this conclusion is inconsistent with the decision of the Privy Council in *Trinidad Lake Asphalt Operating Co. Ltd. v. Income Tax Commissioners for Trinidad and Tobago*.⁴⁹ In that case the appellant company had been assessed under section 30 of the Income Tax Ordinance, 1940, in respect of a dividend payable to the Barber Asphalt Corporation of New Jersey, U.S.A. (hereinafter called "Barber"). Barber had no office or place of business in Trinidad and never exercised or carried on any trade or business there, but was the holder of almost all the shares in the appellant company. At the date of declaration of the dividend Barber were indebted to the appellant company in an amount equal to the amount of the dividend, and in pursuance of an agreement between the parties, no money or cheque changed hands; the matter was settled by appropriate entries in the books of the two companies. In these circumstances the Crown claimed income tax from the appellant company under section 30 of the Income Tax Ordinance, 1940, which provided as follows: "Any resident agent, trustee, mortgagor, or other person who transmits rent, interest, or income derived from any other source within the colony, to a non-resident person shall be deemed to be the agent of such non-resident person and shall be assessed and shall pay the tax accordingly." One question that arose was whether, to bring the section into operation, the transmission to the non-resident person must be to him outside the limits of the colony. There was nothing in the language of the section to necessitate such a construction, but the Board proceeded on the footing that "transmits" meant transmits to a non-resident outside the limits of the colony.

Lord Wright delivered the judgment of the Board. He relied on *In re Harmony and Montague Tin and Copper Mining Co. (Spargo's Case)*⁵⁰ as establishing that there may be payment by settlement of accounts without the necessity of money actually changing hands. He referred to some observations of Lord Lindley in *Gresham Life Assurance Society Ltd. v. Bishop*⁵¹ as further supporting the view that a settlement of accounts may be equivalent to a receipt of a sum of money. He said⁵² that

⁴⁷ 20 Tax Cas. 229.

⁴⁸ [1936] 1 K.B. 645.

⁴⁹ [1945] A.C. 1.

⁵⁰ (1873) L.R. 8 Ch. 407.

⁵¹ [1902] A.C. 287, 296.

⁵² [1945] A.C. 1, 11.

“ since 1902, the transmission of funds had become still more divorced in the minds of business men, and even of lawyers, from the idea of any material embodiment.” His conclusion may be summed up in the following passages⁵³: “ In the present case, no one could say that the entries in the books of the two companies did not represent a genuine transaction and a receipt of money in the form in which money is transmitted and received as between business men. . . . The only evidence or material embodiment of the transaction may consist of entries in the books on each side made in pursuance of their agreement, but what has happened is, if so intended, equivalent to a receipt of money, in Lord Lindley’s words, and a receipt of anything by a person who is at a distance from the sender involves a transmission. Hence, in their Lordships’ opinion, the transaction in the present case involved a transmission of ‘ revenue ’ within the meaning of section 30 from the appellant to Barber, with the consequence that the appellant became liable as statutory agent for the amount of the tax.”

Speaking for myself I doubt if I should have come to the conclusion that there had been a transmission outside Trinidad. I should have inclined to the view that the parties had expressly agreed that there should be no transmission outside Trinidad, but that the debt should be discharged by payment by way of set-off in Trinidad. I might still have reached the same concrete result as Lord Wright, for, as at present advised, I see no reason why, for the purpose of the section, the transmission to the non-resident need be outside the island. This point does not, however, arise for decision in the present case.

Even if I were to accept the whole of Lord Wright’s reasoning, it would not, I think, decide the present case. Let me assume that in the Trinidad case Barber had not been indebted to the appellant company and had had no place of business in the colony and had never exercised or carried on any trade or business there. Let me assume further that before the dividend was declared it had been agreed that payment of it should be made by a transfer by the appellant company to an account to be opened in the name of Barber with a bank in Trinidad. If this had been carried out, there would no doubt have been a transmission by the appellant company to Barber, but I cannot imagine that any court would have held that that was a transmission outside the limits of the colony.

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⁵³ [1945] A.C. 1, 11-12.

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The hypothetical case I have put seems to me far nearer in its facts to the present case than the actual case which arose for decision in the Privy Council in 1945. True it is that in the present case the original indebtedness of the respondent to the bank was created by a loan in London, but the parties agreed that that loan should be discharged by payment in Ceylon. In these circumstances, to hold that there was a remittance to London in the present case would, I think, be to disregard the warnings given by Lord Halsbury L.C. and Lord Macnaghten in *Gresham Life Assurance Society v. Bishop*,⁵⁴ to which the Lord President referred,⁵⁵ "not to be led astray by an 'equivalent' "to a remittance or receipt or a 'constructive receipt.'"

Let me conclude with a citation from the speech of Lord Simonds in the very recent case of *St. Aubyn v. Attorney-General*.⁵⁶ Lord Simonds said: "Lord Wensleydale's familiar "words (as Parke B. in *In re Micklethwait* ⁵⁷), which were cited "by Lord Halsbury L.C. in *Tennant v. Smith* ⁵⁸ may again be "repeated: 'It is a well-established rule, that the subject is not "'to be taxed without clear words for that purpose; and also, "'that every Act of Parliament must be read according to the "'natural construction of its words.' Lord Halsbury adds that "in a taxing Act it is impossible to assume any intention or "governing purpose in the Acts to do more than take such tax "as the statute imposes: it must be seen whether the tax is "expressly imposed. This is true doctrine which I must bear in "mind as I listen to the constant refrain of learned counsel for "the Crown that this or that is just the transaction at which "this or that section is aimed. The question is not at what "transaction the section is, according to some alleged general "purpose, aimed but what transaction its language, according to "its natural meaning, fairly and squarely hits."

Applying this citation to the present case, it is attractive to suggest that as the respondent obtained and spent these loans in London and was, so far as the evidence goes, able to discharge them only from moneys in Ceylon, part at any rate of which was income, and as the loan was in fact discharged, the money he received in England must have been received at least in part from remittances of income from Ceylon. Attractive though this may be, it seems to me quite impossible to bring what happened within the compass of the rule. It is plain that the income

⁵⁴ [1902] A.C. 287, 291-2.⁵⁷ (1855) 11 Ex. 452, 486.⁵⁵ 1950 S.C. 353, 360.⁵⁸ [1892] A.C. 150, 154.⁵⁶ Ante, 15, 32.

receipts of the respondent were all received in Ceylon. It is plain that the moneys he received in London were advances of capital. There is no finding that those advances were made on credit or on account in respect of income in Ceylon which it was intended should be brought to London. On the contrary, the parties expressly agreed that the debt should be discharged in Ceylon, it was so discharged and there is no evidence that the rupees which the bank received in Ceylon were ever remitted to London.

For these reasons, which are in substance the same as those given by the Court of Session, I would dismiss the appeal. The case must be remitted to the Court of Session in order that any necessary adjustments may be made to give effect to the admissions made by Mr. Keith as to the transfers of £1,428 12s. 8d., £1,999 12s. 5d. and £600 to which I have already referred.

Appeal dismissed.

Solicitors: *Solicitor of Inland Revenue; Lawrence Jones & Co., for Warden, Bruce & Co., W.S., Edinburgh, and J. C. Muir & Barr, Glasgow.*

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INLAND
REVENUE
COMMISSIONERS

v.
GORDON.

Lord Cohen.

GAMINI BUS CO. LD. APPELLANT;
AND
COMMISSIONER OF INCOME TAX,
COLOMBO RESPONDENT.

J. C.*

1952
July 29.

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

Ceylon—Revenue—Income tax—Omnibus company—Estimated assessment—Governing factors—Income Tax Ordinance, c. 188 of 1932, as amended, ss. 4 (1), 64 (2), 69, 73 (4).

The appellant bus company, whose returns of income for the four years 1943–44 to 1946–47 inclusive had not been accepted by the assessor who, pursuant to the powers conferred by section 64 (2) of the Ceylon Income Tax Ordinance, had substituted an estimated assessment, appealed therefrom to the Commissioner of Income Tax. On that appeal the assessor produced a document which

* *Present: VISCOUNT SIMON, LORD NORMAND, LORD OAKSEY, LORD REID and SIR LIONEL LEACH.*

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showed the expenditure of seven other bus companies on petrol and oil and tabulated the net profit on which those companies were assessed so as to show an average ratio of profits to the expenditure on petrol and oil. The names of the other bus companies were not given in the document, and the figures were extracted from files in the Income Tax Department. The assessments on the appellant company ultimately arrived at by the Commissioner and later confirmed by the Board of Review were based in substance on the view that the profits of a bus company in that area had a fairly constant ratio to the company's expenditure on petrol and oil, and that the document showed that there were solid grounds for accepting such a ratio in calculating the appellant's proper assessment:—

Held, (1) that the view that such a ratio existed in the case of such bus companies and might be taken as a guide to proper assessments was one which the assessor and the Commissioner were entitled to hold and to apply, according to their judgment.

(2) That the document put in by the assessor did not necessarily make a disclosure of "the affairs of any person" within the meaning of section 4 (1) of the Income Tax Ordinance, for it contained no name except that of the appellant company, and the other entries were extracted anonymously from numbered official files, and it was not produced and used for the purpose of disclosing information about other identified or identifiable taxpayers, but to help to show that the ratio between net profits as assessed and the cost of petrol and oil was fairly constant in many cases, and that in using the suggested ratio as a test the assessor and the Commissioner were not acting capriciously or at random. Section 4 of the Ordinance was not therefore infringed.

(3) That the figures given in the document as going to illustrate and confirm the ratio (though they could not be checked by the appellant) were not improperly put before the Commissioner or the Board of Review, and that there had been no breach of the principles of fair play and natural justice in putting them forward.

(4) That while the document contained figures which showed that in the view of the revenue authorities nearly all the other bus companies had understated the profit which they had made, each taxpayer was entitled to have his assessment fixed, if his own return was not accepted, at a figure which the taxing authorities honestly believed to be proper in his individual case, and no argument that in that class of business the figure of return was habitually understated could be used to prove that that had happened in his case also.

Decree of the Supreme Court of Ceylon affirmed.

APPEAL (No. 36 of 1951) from a decree of the Supreme Court of Ceylon (Dias S.P.J. and Swan J.) (July 18, 1950), on a case stated by the Board of Review under section 74 of the Ceylon Income Tax Ordinance.

The appeal related to the amounts at which the appellant

company was liable to be assessed to income tax under the Ordinance for the fiscal years 1944 to 1947 inclusive in respect of income derived from its business of carrying passengers in road vehicles. The ultimate questions for decision were whether, having regard to the relevant provisions of the Ordinance, the assessor was entitled to reject the returns of income which were made by the appellant, and to estimate the amount of its income by reference to, among other matters, the returns of income, expenditure and profits made to the assessor by other bus companies, which were not identified by name to the appellant, and to assess the appellant by reference to the estimates so made; and whether the Board of Review were entitled to take into consideration particulars of the returns made by the other unidentified bus companies.

The facts and the material provisions of the Ordinance are set out in the judgment of their Lordships.

1952. July 10, 14 and 15. *Frederick Grant Q.C.*, *Dingle Foot* and *G. B. Kumarakulasinghe* for the appellant company. The only question is whether the document R14, prepared by the assessor and put in by him on the hearing of the appeal before the Commissioner, which in relation to a number of other bus companies shows the relationship between petrol and oil expenses and net profits as assessed for income tax, was wrongly admitted and used by the Commissioner and the Board of Review against the appellant. The first submission is that the disclosure of the information contained in that document by the assessor at the hearing before the Commissioner, and later before the Board of Review, is prohibited by section 4 (1) of the Ordinance, which provides that "... every person ... employed in carrying out ... the provisions of this Ordinance shall preserve and aid ... in preserving secrecy with regard to all matters relating to the ... affairs of any person that may come to his knowledge in the ... performance of his duties under this Ordinance, and shall not ... communicate any such matter to any person other than the ... person to whom such matter relates. ...". Secondly, assuming that the first point is a bad one, then, the detailed figures in R14 having been put in, the appellant has not been given the means of checking them, and that is not giving the appellant a fair opportunity to correct or contradict the evidence, and it ought not to be admitted. It is entirely wrong that the figures should be put in evidence against the appellant when the person who puts them in knows the facts which would enable the appellant to

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check them and refuses to give them to the appellant. The appellant does not know the circumstances in which those figures were agreed. As was said in *Board of Education v. Rice*.¹: “Comparatively recent statutes have extended, if they have not originated, the practice of imposing on departments or officers of State the duty of deciding or determining questions of various kinds. . . . They have no power to administer an oath, and need not examine witnesses. They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view.” [Reference was also made to *Local Government Board v. Arlidge*.²]

The appellant company is entitled to test the evidence as well as to contradict it. It did not know who those other bus companies were and so could not test it. R14 is at least a statement “prejudicial to” the appellant within the meaning of the above citation from *Board of Education v. Rice*,³ and it ought not to have been admitted in evidence unless the appellant was given an opportunity of checking and testing its contents. That citation has been approved in a great many cases, e.g., *Rex v. Milk Marketing Board*; *Ex parte North*⁴; *Rex v. City of Westminster Assessment Committee*; *Ex parte Grosvenor House (Park Lane) Ltd.*⁵—in the latter case the document was not disclosed to the ratepayers; in the present case it was disclosed, but in such a way that they could not check it; that was the only difference, and it was just as bad. The point was not decided in *Guillain v. Commissioner of Income Tax*.⁶ [Reference was also made to *De Mel v. De Silva (M. W. H.)*.⁷] Here the appellant was given no opportunity to meet what was put against it, and the case ought to be sent back.

Millard Tucker Q.C. and *Sir Reginald Hills* for the respondent. It has been repeatedly said that when the return of income is not accepted by the assessor he is entitled to make an estimated assessment. He has, indeed, a duty to do so, and the best advice in that connexion is that given by this Board in *Income Tax Commissioner v. Badridas Ramrai Shop, Akola*⁸: “There remains for consideration the point whether the assessment can

¹ [1911] A.C. 179, 182.

² [1914] 1 K.B. 160; [1915] A.C. 120.

³ [1911] A.C. 179, 182.

⁴ (1934) 50 T.L.R. 559, 560.

⁵ [1941] 1 K.B. 53, 68.

⁶ (1949) 51 C.N.L.R. 241.

⁷ (1949) 51 C.N.L.R. 282, 285.

⁸ (1937) L.R. 64 I.A. 102, 114.

“be attacked on the ground that it was not made by the officer to the best of his judgment within the meaning of section 23 (4). . . . The officer has to make an assessment to the best of his judgment against a person who is in default as regards supplying information. He must not act dishonestly, or vindictively or capriciously, because he must exercise judgment in the matter. He must make what he honestly believes to be a fair estimate of the proper figure of assessment, and for this purpose he must . . . be able to take into consideration local knowledge and repute in regard to the assessee’s circumstances, and his own knowledge of previous returns by and assessments of the assessee, and all other matters which he thinks will assist him in arriving at a fair and proper estimate.”

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That passage, it is submitted, is the answer to the present case. Certainly before the Commissioner, and certainly here, it is conceded that the assessor was justified in rejecting the returns, and the moment he is, he must, under section 64 (2), make an estimate. The assessor gave the assessee some indication of what he had done; in England he does not even have to do that. The assessor is performing an official administrative function under the ordinance, and he is required to make an estimated assessment. This Board has negatived that he must hold an inquiry. He just makes an assessment to the best he can, and here he has in fact told the assessee the material on which he was working. He has not got to substantiate his estimate; the onus is on the assessee to displace it—to show that the statement of estimated income was not the actual income made.

The document R14 was not wrongly admitted in the circumstances of this case; it was only evidence that the assessor had used his judgment in making his assessment. This is not giving away any secrets within the meaning of section 4 (1); it is merely collecting statistics. It is a short point, and the only question before the Commissioner and the Board of Review was whether the accounts were properly rejected. That has been admitted, so the only question is whether the estimate made has been displaced, and the onus is on the assessee to do so. It was not for the assessor to defend his assessment, but for the assessee to show that it was wrong and excessive, and he has failed to do so.

Sir Reginald Hills followed. The method adopted by the assessor, and approved and checked by the Commissioner, was a perfectly reasonable line for a public official to take.

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Grant Q.C. in reply. The question is whether the document R14 was wrongly admitted in evidence before the Commissioner. The Indian cases were not in any way comparable with the present case. R14 was put before the Commissioner for the purpose of inducing him to uphold the assessment or something very near it, and it was in fact the document on which his decision was made. And on the dictum in *Board of Education v. Rice*⁹ that document should not have been put in unless the assessee was to be given a proper chance of contesting it. The assessment is being reviewed by the Commissioner on an appeal (section 69 (1)), and the general principle about the unfair admission of evidence applies. Section 69 says nothing about the onus being on the assessee. The figures relied on by the revenue authorities are not the appellant company's figures at all, and in the absence of an opportunity to check that evidence it ought not to have been admitted, and its reception before the Commissioner vitiates the whole of these proceedings. It cannot be the duty of an assessor to disclose the affairs of A in dealing with B.

July 29. The judgment of their Lordships was delivered by VISCOUNT SIMON. This is an appeal from a judgment of the Supreme Court of Ceylon, dated July 18, 1950, on a case stated by the Board of Review under section 74 of the Ceylon Income Tax Ordinance. By that judgment the Supreme Court (Dias S.P.J. and Swan J.) confirmed the decision of the Board of Review dated May 25, 1949, whereby the Board upheld four assessments made on the appellant company by the Commissioner of Income Tax. As originally drawn up, the Board of Review in the case stated indicated its doubt whether any question of law really arose, but an interim order of the Supreme Court directed the following questions to be embodied in the case stated, so that the Supreme Court could adjudicate upon them: (a) Was there evidence or material on which the Board could reject the appellant company's accounts, and was the Board justified in rejecting them? (b) Was a document marked R14 wrongly admitted in evidence at the hearing of the appeal by the Commissioner of Income Tax? (c) In making his order did the Commissioner of Income Tax act on material which was not properly in evidence at the hearing of the appeal by him?

The first of these questions is easily disposed of. The assessor

⁹ [1911] A.C. 179, 182.

had before him a return of income made by the appellant company for each of the four years 1943-44, 1944-45, 1945-46 and 1946-47, and accounts furnished by the appellant company were tendered in support of these returns. By section 64 (2) of the Ordinance the assessor might either (a) accept the returns and make assessments on that basis, or (b) if he did not accept the returns, himself estimate the amounts of the assessable income of the appellant company and assess accordingly. The assessor did not accept the returns made by the appellant company and estimated the amount of assessable income of the appellant company in each of the four years at substantially larger sums. He was, of course, perfectly entitled to do this according to the best of his judgment, and it was not necessary for him to give his reasons for rejecting the appellant's returns or for arriving at his own estimates. It appears, however, from the documents before their Lordships, that the company's returns were rejected for two main reasons. The tendered accounts professed to show that, in the first six weeks of the company's bus services, it made a profit of about Rs. 2,270 a week, which is equivalent to Rs. 118,000 per annum. Yet in the accounts tendered for subsequent periods, each extending over a year or a little less, the rate of profit only worked out at the rate of something like one-third or even only a quarter of this per week, although conditions in these later periods were considered to be very favourable to such a company. The second main reason given for rejecting the appellant company's accounts was that carbon copies of the ticket-books were missing and without these it was considered that the way bills could not be adequately checked.

Whether these reasons were in fact adequate or inadequate is quite immaterial if the assessor honestly came to the conclusion that he should not accept the company's returns, but should substitute estimates of his own. Indeed, when the company appealed to the Commissioner under section 69, it was conceded that the case was one for estimated assessments, though it was urged that the gross receipts as shown in the accounts should be treated as the starting point from which those assessments might be arrived at by proper deductions. The Commissioner was not prepared to reach revised figures by accepting from the company's accounts the gross receipts as shown therein, and Mr. Grant was bound to admit that he was free to arrive at his own estimates of higher income independently of the accounts. The Ordinance, by section 69, confers on a person aggrieved by the assessor's

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estimate the right to carry the matter to the Commissioner and to call on him to "review and revise" such assessment. This process is described as an appeal, and by subsection (6) in disposing of the appeal the Commissioner may "confirm, reduce, "increase, or annul the assessment." From the determination of the Commissioner there is provided, by sections 70 and 71 of the Ordinance, an appeal to the Board of Review, and by section 73 (4) the onus of proving that the assessment as determined by the Commissioner is excessive rests on the appellant.

In the present case, the determination of the Commissioner was that the assessment made for the year 1943-44 should be confirmed, but that the subsequent assessments should be somewhat reduced, though the revised figures were still largely in excess of what the company had put forward. On appeal, the Board of Review confirmed the Commissioner's decision. The Commissioner's determination is an elaborate document setting out his reasons and shows that the assessor as well as the appellant company's advocate attended and put forward arguments. One of the documents which the assessor produced was a statement marked R14, the admission and use of which are impeached in the second and third questions raised in the case stated. It is this document which raises the main point of difficulty.

The assessments arrived at by the Commissioner and confirmed by the Board of Review appear to have been reached, at any rate in part, upon the view that the profits of a bus company in this area bear a fairly constant ratio to the company's expenditure on petrol and oil. Since the amount of the appellant's expenditure on these supplies is recorded, this would enable the approximate profit to be arrived at. The view that such a ratio exists in the case of such bus companies and may be taken as a guide to proper assessments is a view which the assessor and the Commissioner of Income Tax are entitled to hold and to apply, according to their judgment. In R14 the expenditure of seven other bus companies on petrol and oil was set out and the net profit upon which these companies were assessed was also tabulated so as to show an average ratio of profits to this expenditure in the ratio of 1.51 for 1943-44, of .86 for 1944-45, and of 1.74 for 1945-46. The names of the other bus companies were not given, and the figures were extracted from files in the income tax department. In the course of the argument for the appellant, three objections were taken to the production and use of this document.

(1) It was contended that the production of R14 was a breach

of section 4 (1) of the Income Tax Ordinance, which provides as follows: "Except in the performance of his duties under this Ordinance, every person who has been appointed under or who is or has been employed in carrying out or assisting any person to carry out the provisions of this Ordinance, shall preserve and aid in preserving secrecy with regard to all matters relating to the affairs of any person which may come to his knowledge in the performance of his duties under this Ordinance, and shall not communicate any such matter to any person other than the person to whom such matter relates or his authorized representative, nor suffer or permit any person to have access to any records in the possession, custody or control of the Commissioner." On this, it is to be observed that section 4 is to be read with section 86 (2), which provides severe penalties to be imposed by a magistrate for the offence. The section lays down a very necessary rule of conduct to be observed by the officials concerned, since it is of the highest importance that the affairs of an individual and identifiable income-tax payer should not be disclosed, in breach of section 4, to anyone outside. Section 4 is not primarily a rule of evidence, though it would be very improper to disregard it when putting forward a document like R14. But R14 does not necessarily make a disclosure of "the affairs of any person" within the meaning of the section, for it contains no name except that of the appellant company, and the other entries are extracted anonymously from numbered official files. Their Lordships would strongly deprecate the production or use of such a document if it did in effect disclose information about other identified or identifiable taxpayers, but it is obvious that the document was prepared and produced not for this purpose but to help to show that the ratio above referred to between net profits as assessed and the cost of petrol and oil was a fairly constant ratio in many cases, and that in using the suggested ratio as a test the assessor, and the Commissioner after him, were not acting capriciously or at random. Mr. Grant admitted that the ratio might properly have been supported by a document containing total figures, so that under this head the objection is to details which make up the totals and which need not have been included at all. Their Lordships do not consider that section 4 was infringed and this renders it unnecessary to decide whether, if it was infringed, this would in itself invalidate the assessment.

(2) It is next said that, even if the first objection fails, it was unfair to make any use of R14 since the appellants could not be

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given an opportunity of examining the files from which the figures of other bus companies were extracted, or of ascertaining which companies they were. This, indeed, is the ground on which R14 is attacked in the notice of appeal to the Board of Review against the decision of the Commissioner. The answer appears to be that the company could have no complaint if the taxing authorities had asserted and applied the alleged ratio without giving these details, and that the appellants can hardly be treated as suffering an injury because more detailed figures were not withheld. Their Lordships agree with the Supreme Court in thinking that the figures given in R14 as going to illustrate and confirm the ratio were not improperly put before the Commissioner or the Board of Review, and that there was no breach of the principles of fair play and natural justice in putting them forward. It is true that the figures of net profit in R14 are the figures at which the various bus companies were assessed to taxation, and in most cases are very different from the figures in their own income tax returns. But this comment only goes to the weight to be attached to the resulting ratio and does not destroy the whole effect of the contention that the ratio is supported by experience in other instances.

(3) The third objection only emerged late in the argument before the Judicial Committee. R14 also contains figures, in the case of these other bus companies, which show that in the view of the income tax authorities nearly all of them understated the profit they had made. If there was reason to think that the effective argument based on R14 was that, as other bus companies had made false returns, the appellant company had done so also, their Lordships would have no hesitation in declaring that such an argument is wholly inadmissible and that a document put forward to support it is open to the gravest objection. The contention that this was the use made of R14 receives, at first sight, some support from the document drawn up by the Commissioner, in which he attributes to the assessor the argument that gross receipts are "generally understated" in the case of bus companies. But this appears to be intended only as a retort to the argument on behalf of the appellant urging that the gross receipts as shown in the company's accounts should be accepted. The Commissioner uses R14 only to confirm the ratio put forward. The Supreme Court approaches the matter in the same way. Although there are columns in R14 which might lend themselves to be used to support an illegitimate argument, the grounds on which the decision was based do not appear to involve any

misuse of these figures. Those grounds were that the income tax authorities were entitled to reject the return made by the company and to substitute their own higher estimate of profits; that before the Board of Review the burden lay upon the appellant to disprove the correctness of this estimate and to establish some lower figure; that reliance on a ratio between net profit and the expenditure on petrol and oil was legitimate; and that R14 showed that there were solid grounds for accepting such a ratio in calculating the appellant's proper assessment.

Their Lordships cannot conclude this part of their judgment without emphasizing in the plainest terms that it would be wholly improper to justify the rejection of the appellant's accounts and the substitution of a higher figure of assessment merely because, in the case of other taxpayers in the same line of business, the conclusion has been reached that their accounts were not accurately kept, and that their returns required to be rejected. Each taxpayer is entitled to have his assessment fixed, if his own return is not accepted, at a figure which the taxing authorities honestly believe to be proper in his individual case, and no argument that in this class of business the figure of return is habitually understated can be used to prove that this happened in his case also.

Objection was also taken by the appellant to a document marked R12 which was produced by the assessor before the Commissioner and is referred to in the latter's determination. R12 contains figures used in the computation of profits of another (but unidentified) bus company for the year 1947-48, and is apparently intended to reinforce the argument that a figure of gross takings derived from way bills requires to be checked by ticket books. Be that as it may, their Lordships do not consider that R12 or any other document criticized affords adequate ground for the appellant's objection.

Their Lordships are therefore in agreement with the Supreme Court and will humbly advise Her Majesty that the appeal should be dismissed. The appellant must bear the costs.

Solicitors: *T. L. Wilson & Co.; Burchells.*

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[HOUSE OF LORDS.]

H. L. (E.)* UNITED STATES OF AMERICA AND
 REPUBLIC OF FRANCE APPELLANTS;
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 Dec. 10, AND
 11, 12, 13, DOLLFUS MIEG ET CIE. S.A. AND BANK
 17, 18, 19. OF ENGLAND RESPONDENTS.
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*International law—Sovereign immunity—Property of French subject—
 Bar gold seized by German forces in war—Recovery by allied
 governments—Deposit at Bank of England for safe custody—Action
 by owner against bank—Possession and control of depositing
 governments.*

The Bank of England held, as bailee for the Governments of the United States, France and the United Kingdom, 64 numbered gold bars claimed to be the property of a French company. The bars had been wrongfully seized by the German authorities during the second world war and taken to Germany. After their recovery by Allied forces they were lodged with the bank by the governments for safe custody pending their ultimate disposal. The bank sold 13 of the bars by mistake, retaining 51. The company brought an action against the bank claiming delivery of the bars, an injunction restraining the bank from parting with possession of them, and, alternatively, damages:—

Held, (1) that the action must be allowed to proceed as regarded the 13 bars, since the bank had by its own act terminated the bailment, but (2) that the action must be stayed as regarded the remaining bars since the doctrine of the immunity of a foreign sovereign applied to the case of a claim to recover property in the hands of a bailee for a foreign sovereign, and, further, there was no jurisdiction to order the bailee to pay damages for conversion, since the bailee would thereby acquire the title to the property so as to be able to set it up against the bailor, the foreign sovereign.

Decision of the Court of Appeal sub nomine *Dollfus Mieg et Compagnie S.A. v. Bank of England* [1950] Ch. 333 varied.

APPEAL from the Court of Appeal (Evershed M.R., Somervell and Cohen L.JJ.).

The Bank of England held, for safe custody, 64 numbered bars of gold which in 1944 had been forcibly and wrongfully removed by German troops from a French bank then holding them on behalf of Dollfus Mieg et Cie. S.A., a French company. The bars were eventually recovered in Germany and lodged with the

* *Present*: EARL JOWITT, LORD PORTER, LORD OAKSEY, LORD RADCLIFFE and LORD TUCKER.

Bank of England by the Governments of the United Kingdom, France and the United States for safe custody pending their ultimate disposal.

The company brought an action against the Bank of England claiming delivery of the bars, an injunction restraining the bank from parting with possession of them otherwise than as directed by the company and, alternatively, damages.

The bank applied by motion to have the writ set aside and all subsequent proceedings in the action stayed on the grounds that the bars were in the possession or control of the three governments, and that the action impleaded two foreign sovereign States which declined to submit to the jurisdiction of the court. The company moved the court for an interlocutory order to restrain the bank from parting with the bars.

On appeal from Jenkins J., who had ordered all further proceedings in the action to be stayed, there was produced before the Court of Appeal further evidence on behalf of the bank, from which it appeared that it had then been discovered that between December 30, 1948, and January 26, 1949, and after the issue of the writ in the action, 13 of the gold bars had been sold by mistake. Although the bars had been segregated pending directions from the three governments as to their disposal, it appeared that a warning notice had not been attached to the cards which constituted the record of the bullion office of the bank, and that consequently the 13 bars had been sold by an official in that office. The Court of Appeal allowed the appeal from Jenkins J., ordering the bank's motion to be discharged and giving the company leave to apply for an injunction in respect of the 51 remaining bars: *Dollfus Mieg et Compagnie S.A. v. Bank of England*.¹

Subsequently the bank applied to the Court of Appeal for the postponement of the drawing up of its order to enable the governments of the United States of America and the Republic of France to be joined as defendants in the action. The court declined. These governments then presented a petition to the House of Lords for leave to appeal although they were not parties to the action and, alternatively, for an order adding them as defendants. The Appellate Committee ordered the petition to stand over generally with liberty to any party to apply to restore it on the footing that the governments should apply to the court for leave to be joined as defendants. On their application Wynn-Parry J. subsequently ordered that they should be so joined: *Dollfus Mieg et Compagnie S.A. v. Bank of England*.²

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¹ [1950] Ch. 333.² [1951] Ch. 33.

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On November 3, 1950, the governments moved Romer J. for a stay of all further proceedings in the action, or alternatively of all such further proceedings as related to the remaining 51 bars. He dismissed the application and the Court of Appeal affirmed his decision. The governments appealed to the House of Lords.

The facts are fully set out in the opinion of Earl Jowitt.

Sir Hartley Shawcross K.C. and *Denys Buckley* for the appellants. The decision of Jenkins J. was right for the reasons given in his judgment. The real point of the case is the capacity in which the bank was holding the bars. The foreign governments were in de facto possession of the bars. They were also, according to their main contention, in control through the bank holding as bailee. Once that relationship is established the case is unarguable by the respondent company. There was a segregation of the bars and, whatever carelessness there may have been, the intention and the contractual obligation of the bank to the governments was to segregate them and keep them safe. The actual loss of control by a bailor of some of the chattels entrusted to him by reason of some accident, mistake or breach of duty does not cause him to lose control of any of the others, and the disposal of the 13 bars by an employee of the bank, through the neglect of the precautionary methods, in breach of his duty to the bank and the bank's duty to the governments, did not affect the control of the governments of the remaining bars. It is agreed that the case should be dealt with as though the writ had been issued after the disposal of the 13 bars.

In general the appellants adopt the view of the present case expressed in the article on Sovereign Immunity and Possession signed A. L. G., (1950) 66 Law Quarterly Review 459. The general principles applicable are laid down in the authorities and in particular by Lord Atkin in *Compania Naviera Vascongado v. The Cristina*.³ That case puts it beyond doubt that an attempt to interfere by legal action with a sovereign's right to the user, direction or control of a chattel, although falling short of actual possession, infringes his immunity. See also *The Parlement Belge*.⁴ The cases dealing with questions where there is something in the nature of a trust fund in which a foreign sovereign is interested are not relevant here. For the purposes of this case the appellants are prepared to accept that the property in the bars remains in the respondent company.

³ [1938] A.C. 485.

⁴ (1880) 5 P.D. 197, 214-5, 218-9.

The appellants rest on five points :

(1) Notional constructive possession is enough to attract the doctrine of sovereign immunity. The sovereign is entitled to a stay of proceedings against himself or a third party in relation to objects which he has in his constructive or notional possession. (This is not the point on which the appellants rely most strongly.) There is nothing startling in this application of a rule of international law. English law has never developed any distinct theory of possession, but civilians would not have any difficulty touching the matter, whether as *locatio* or as *depositum*. The governments did not lose possession of the bars by depositing them, and that is the vital point: see 66 *Law Quarterly Review*, p. 463; *Smith v. Milles*,⁵ *per Ashhurst J.*; *Nicolls v. Bastard*,⁶ *per Parke B.*; *The Amazone*⁷; *The Broadmayne*⁸; *The Arantzazu Mendi*⁹; *The Crimdon*¹⁰ and *Ancona v. Rogers*.¹¹

(2) In any event, control falling short of possession of the thing controlled is sufficient to entitle the foreign sovereign to rely on the doctrine of sovereign immunity: see *The Cristina*,¹² *per Lord Atkin*. What is enough to constitute control for this purpose is a question of fact. "Control" is not a term of art. One must consider what is the thing over which control is exercised. A dangerous dog can only be controlled by shutting it up. Cattle can be under control though at large in a field. A horse may be under the control of a person who has put it out at livery, for use when he needs it. A bailee such as the bank in the present case has no right to deny the title of the person from whom he has received the thing bailed and is obliged to carry out the bailor's orders as to its disposition. In the case of gold bars it is of no significance as regards control how they are kept so long as they are kept safe and can be realized or used as security. In regard to these last mentioned matters control is significant and in this respect they were under the control of the governments. There is a distinction between control and possession and it is significant that control here consists in being able to tell those in possession what to do with the property.

(3) This action constitutes an indirect impleading of the sovereign governments within the meaning of the doctrine which protects them against the use of such procedure. The foreign sovereign must not be put into the dilemma that, though the

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⁵ (1786) 1 Term Rep. 475.

⁶ (1835) 2 C.M. & R. 659, 660.

⁷ [1939] P. 322, 325-6.

⁸ [1916] P. 64.

⁹ [1939] A.C. 256.

¹⁰ (1918) 35 T.L.R. 81.

¹¹ (1876) 1 Ex.D. 285, 289, 292.

¹² [1938] A.C. 485.

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proceedings are not in name against him, he must either intervene in support of one of the parties or suffer the loss of or prejudice to his interest in the subject-matter. He is indirectly impleaded if the proceedings relate to property which is owned by him or of which he is in possession or of which he has a right to immediate possession as against the custodian at the time or which is under his control: see *The Parlement Belge*¹³ and *The Jupiter*.¹⁴ *Haile Selassie v. Cable and Wireless Ltd.*¹⁵ appears to be against the appellants but is distinguishable as being a very different case. There is a distinction between debt and detainee. It could not be said there that there was property in the hands of anyone who was in any sense an agent. *Twycross v. Dreyfus*¹⁶ is very like the present case. For all practical purposes the present action forces the governments in question to come in and protect the bank acting on their behalf.

(4) Current reciprocity on the part of the government claiming immunity is not an ingredient in the validity of such a claim since the doctrine has itself been accepted as part of the law of nations and has been received into English law. There is no authority in English law for suggesting that it is necessary for a sovereign State to show that it grants corresponding immunity in its own courts.

(5) Although 13 of the bars have been sold and melted down, that is not a reason why the action should go on in respect of them, since it would be just as prejudicial to the foreign sovereign that the action should go on in respect of them as in respect of the other bars. If the action were against third parties into whose hands the bars had fallen the position would be quite different since quoad Dollfus Mieg et Cie. a disposal of them or a refusal to deliver them up would be a conversion. Till the moment they were disposed of the possession of the bank was the possession of the governments. That possession and control lasts till they are actually parted with. The removal of the 13 bars has no bearing on the position of those which remain. The bailee is estopped from questioning the title of his bailor: see *Biddle v. Bond*.¹⁷ This action puts the appellants in the dilemma that they must either intervene or lose their interest.

Denys Buckley following. The disposal of the 13 bars raises a question of fact (viz., what is the contractual relationship between the governments and the bank?) and a question of law

¹³ 5 P.D. 197.

¹⁴ [1924] P. 236, 242, 244-5.

¹⁵ [1938] Ch. 839, 845.

¹⁶ (1877) 5 Ch.D. 605, 609.

¹⁷ (1865) 6 B. & S. 225.

(viz., does the doctrine of sovereign immunity come into play at all?) It is suggested that, irrespective of the contractual relationship, the governments have not control of the bars, but that is fallacious, for the matter must depend on the contractual relationship. It does not make any difference whether or not the bank carried out its obligations faithfully or whether the governments in fact exercised the control which they had. The bars were to be held separately and the segregation was in operation. If the governments had heard that the bank did not mean to carry out its obligations they could have called it to account. The fact that they did not know of the disposal of the 13 bars has nothing to do with the degree of control which they exercised; that depends on the contract. At all material times they had complete dominion over the bars and the right to tell the bank what to do with them. For all practical purposes they had complete dominion over the situation. They had more control over the bars than a charterer has over a ship. Immediately after the 13 bars were disposed of the governments had an action for conversion and could have recovered their full value by way of damages. The appellants are not contending for an extension of the doctrine of sovereign immunity but for an application of it to the facts. If the effect of the company's action would be to deprive the governments of their right to damages against the bank the action should be stayed. It amounts to an indirect impleading of a foreign sovereign since the governments must either intervene or risk losing their rights against the bank.

Cross K.C. and *J. R. C. Lee* for the Bank of England. The bank supports this appeal. The question arises whether on the correspondence the original "fine ounce" contract was altered to a "specific bar" contract. If the former contract governed the matter the governments would have no right of control over any of the bars and the bank has done nothing wrong, but if the latter governed the matter the bars were under the control of the governments. If an employer's goods are in the hands of his butler they are not the less under his control because the butler is indifferent in the performance of his duties and the goods are about to be lost or stolen.

As to the 13 bars the bank wishes to preserve all its rights in case the action goes on and the governments fail to help to defend it or the action is lost and the bank must pay damages to the company. The bank asks the House to say nothing which would prevent the bank from subsequently relying on such a judgment obtained against it, since, if it has to pay damages, the

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Sir Andrew Clark K.C. and *Richard Wilberforce* for the respondent company. If this was a debtor and creditor relationship on the basis of a "fine ounce" contract no question of sovereign immunity can arise. But if the contract as to the 64 bars created a special contract of bailment it becomes necessary to consider in detail the effect in law of such a bailment and whether it would result in possession or control remaining in the bailors. If so, the question arises whether it was such possession or control as to found a claim for sovereign immunity. The question of fact must be decided on the evidence and depends really on the construction of certain letters. The court may look at the subsequent conduct of the parties to see how they themselves construed it.

Before 1940 the bank would accept gold deposited by its customers and would keep it separate, but since then it has not been the practice of the bank to keep it separate. Once it was weighed and assayed it was pooled and thereafter the customer had no right to any specific gold; he could only demand the number of fine ounces of gold comprised in his deposit. Although the contract was still called a "gold set aside" contract, no gold was in fact set aside. In this matter, in the contract between the bank and the Treasury acting on behalf of the three governments, the bank was acting as an independent contractor and not as the servant or agent of the Treasury or of any of the governments, and the measure of its liability was the "fine gold" contract and nothing more. The correspondence does not show a variation of the contract or, if it does, the variation imposed an obligation not to hold the bars indefinitely but only to hold them temporarily. The letter from the bank to the Tripartite Commission dated October 25, 1948, meant: "We have in fact but "without obligation held the bars separate but the obligation of "separation ceased once we had them assayed." The evidence, as the respondents submit, establishes that the relationship between the bank and the governments in regard to all the bars was not that of bailee and bailor of the specific bars but was that of debtor and creditor to the extent of the particular quantity of gold deposited; consequently the bars were at no material time in the possession or control of the three governments or any of them. It is conceded that if the contract had been one of bailment the fact that some of the bars were wrongfully sold could not affect the contract as regards the remaining bars. Alternatively

the Treasury was the customer and the Tripartite Commission only had power to draw on the account through certain specified persons nominated by the Treasury.

It is not usual to stay an action in limine when there is a dispute of fact. The appellants have to discharge a very heavy onus. In any event, there is a perfectly good action against the bank. It is properly constituted and can proceed without the three governments or any of them being made parties. They need not be impleaded, directly or indirectly, and the company should not be affected by the terms of any contract between the bank and third parties. The immunity granted is for the benefit of foreign sovereigns and not of those who contract with them.

On the assumption that there was a bailment the questions arise: (1) Did the three governments as joint bailors retain (a) possession of the bars and (b) control of them? If the answer is "No" the matter ends and the appeal must be dismissed. (2) If, however, there was some element of possession or control in the three governments, would judgment for the plaintiff company in this action so interfere with that possession or control as to prevent the court's entertaining the suit because of the sovereign immunity of the United States and French Governments? It must be noted that if joint possession in the true sense is established as residing in the three governments, each one of them has possession, but if all that remained in them was control then two of the governments alone have not got control. To call an immediate right to possession "constructive possession" confuses the issue. Constructive possession, properly speaking, exists in relation to the deeds in a box of which one has been given the key. There are also the similar cases of being given the key of a house or of a safe deposit. All that constructive possession can mean in this case is the right to resume possession by determining the bailment. That is vested in all three governments and not in two alone; so all must act together.

When a foreign sovereign State is claiming immunity, it will be allowed if it is shown that immunity has been allowed in the English courts in similar circumstances and that a principle has been laid down which covers the case, but when it is sought to extend the principle of immunity, the courts will look at the general practice among civilized nations to see whether the extension should be made. The modern tendency is to restrict rather than extend sovereign immunity. Immunity will only be granted where the nation claiming it grants reciprocal immunity to others,

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and here there is no evidence that the appellants would grant immunity in such a case as this.

The English courts will not allow immunity in any cases not covered by *Compania Naviera Vascongado v. The Cristina*,¹⁸ in which Lord Atkin laid down the correct principles: (1) A foreign sovereign cannot be cited to appear before an English court. No action can be allowed to proceed if, directly or indirectly, a foreign sovereign is cited as a party to it or if it is an action in which a foreign sovereign is a necessary party (see *Twycross v. Dreyfus*¹⁹) or if the matter is not properly constituted without him. The question of citing a foreign sovereign indirectly can only arise in the case of a writ in rem. Thus, in an action against a ship the owners are directly cited but other persons having an interest in the ship are indirectly cited. This is what is meant by saying that the doctrine of foreign immunity applies where the foreign sovereign is in the dilemma of either losing his interest or coming before the courts to defend the action. (2) The English courts will not entertain any action which, if successful, would involve making an order which would interfere with the possession or control of a foreign sovereign either of his own property to which he has a legal title or of property of which he had de facto possession or control, whether rightful or wrongful, since that is a matter into which the court will not inquire. Where a foreign sovereign is not directly impleaded he must prove to the satisfaction of the court either that he has a legal title to the property liable to be seized under any order which might be made or that he has possession and control of it in his own person or through his servants. Impleading him means bringing him before the courts and indirect impleading means putting him in a position in which he must either appear or allow an order to be made which will be binding on him. The mere statement that the property is his is not enough, though how much he must establish is not settled. A foreign sovereign might seize goods in England without any legal right and bail them to a private person within the jurisdiction. In such a case the action against the bailee would not be stayed. In *The Cristina*²⁰ the word "control," as used by Lord Atkin, applied to ships, but is irrelevant in the case of chattels on land since one cannot control the latter unless they are in one's possession. Lord Atkin did not use the word "possession" in a loose sense. See also *per* Lord Wright.²¹

¹⁸ [1938] A.C. 485.

¹⁹ 5 Ch.D. 605.

²⁰ [1938] A.C. 485, 490.

²¹ *Ibid.* 504, 509.

The courts will not by their process seize the property of a foreign sovereign (whether or not he is a party to the proceedings) or property of which he is in possession or control.

It is the duty of a bailee to defend his bailor's goods; so here the foreign governments have someone whose duty it is to defend their title and, therefore, the case can be heard without their intervention. Another course open to the bailee here would have been to obtain the authority of the French company to side with it and let the bailors sue for recovery of the bars. A bailee can also interplead.

It is said that the court cannot adjudicate on the title of a foreign sovereign. But it will do so in an action which is properly constituted without making him a party, if judgment in the action will not bind him in his absence: see *Haile Selassie v. Cable and Wireless Ltd.*²²

On the assumption that there was a bailment it is necessary to consider fully Lord Atkin's two propositions in *The Cristina*.²³ It should be noted that an action in rem always offends against both if it offends against either. As to Lord Atkin's first proposition, see *Mighell v. Sultan of Johore*²⁴; as to his second, see *Vavasseur v. Krupp*.²⁵ The present case, if it falls under either proposition, falls under the second, for there is no direct impleading. It is to be noted that Lord Atkin uses the simple word "implead," not adding the words "direct" or "indirect." What was called "indirectly impleading" in *The Parlement Belge*²⁶ was regarded by him as direct impleading. What is called "indirect impleading" can have no application at all to an action in personam, since a sovereign cannot be compelled by such an action, to which he is not a party, to abandon his property, whereas in an action in rem judgment is binding against him and against all the world. The explanation of *The Parlement Belge*,²⁶ which is the whole origin of the conception of indirect impleading, is in *Haile Selassie v. Cable and Wireless Ltd.*²⁷

Since the present action does not implead a foreign sovereign, directly or indirectly, the only question which can arise is whether, if the bars are in the possession or control of the foreign governments, the result of the action would be to seize or detain them. This is the question which arises on the observations in *The Cristina*,²⁸ and to go beyond them would be to extend the law.

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²² [1938] Ch. 839.

²³ [1938] A.C. 485, 490.

²⁴ [1894] 1 Q.B. 149.

²⁵ (1878) 9 Ch.D. 351.

²⁶ 5 P.D. 197, 217.

²⁷ [1938] Ch. 839, 845.

²⁸ [1938] A.C. 485, 490.

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The test is seizing and detaining, not prejudicially affecting. Further, possession is not a bar to the action, although it may be a bar to relief in the action if that relief would amount to seizing or detaining the property. The trust cases are not really in a separate category because the foreign sovereign would only be bound if he were made a party: see *Westlake on Private International Law*, 7th ed., p. 267, s. 190, p. 275, s. 193, *Gladstone v. Mursurus Bey*²⁹ and *Larivière v. Morgan*.³⁰

Light is thrown on the present problem by the United States cases. They are precedents on international law which is based on the generally accepted policy of civilized nations; they are evidence of what that is. They should be given special weight because they are derived from the common law: see *The Davis*³¹; *Long v. The Tampico*³² and *Compania Espanola de Navigacion Maritima S.A. v. The Navemar*.³³

On the point of possession and control the law is as follows: (1) Possession is exclusive and individual and cannot exist in two persons at the same time. (2) In the case of a bailment possession is in the bailee because transfer of possession is an essential ingredient in bailment. (3) No element of possession can remain in the bailor; a fortiori he does not retain custody. (4) Control of a chattel cannot exist apart from possession or custody; control is an element in possession. (5) A bailor cannot have control, since he has neither possession nor custody; all he has is a bare right against the bailee only to terminate the bailment and thereby regain control. (6) Delivery of control to the bailee is just an essential element in the delivery of possession. (7) If there were neither possession nor control in the bailee there would be no bailment but the bank would be the mere servant or agent of the three governments. (8) The bailor's right to sue in trespass is not founded on possession, which he has not got, but on ownership, which he has. (9) This action is not one in which judgment would necessarily result in seizure and detention of the bailed goods. (10) Actions for detinue and conversion, being personal actions, are correctly brought against the person in actual possession (e.g., a bailee); a bailee can always be sued by a third party and the bailor's title can be tried in the action without any necessity of joining the bailor. (11) Judgment for the plaintiffs in the present case for damages only would not even affect the bailor's right to possession as against the bailee because the bailee

²⁹ (1862) 1 H. & M. 495, 500.

³² (1883) 16 Fed.Rep. 491, 501.

³⁰ (1872) L.R. 7 Ch. 550, 559.

³³ (1938) 303 U.S. 68.

³¹ (1869) 10 Wallace 15.

is not estopped from denying his bailor's title if he elects to challenge it relying on the title of a third party and with that party's authority.

Even if the bars, or any of them, were held by the bank as bailees for the three governments, neither in fact nor in law were they in the possession or under the control of those governments or any of them. At all material times they were in the possession and under the control of the bank.

Ancona v. Rogers,³⁴ relied on by the appellants, is distinguishable. It turned on the words of the Bills of Sale Act, 1854, and the relevant expression was "apparent possession," which is different from actual possession. The judgment was not concerned with possession as opposed to property, and the rule in the dicta relied on applies only where the bailor has the property and the bailee has possession. In such a case the bailor can sue by virtue of his right of property, but only the bailee can sue for possession. If it was intended to suggest that the goods were actually in possession of the bailor, the dicta, which were obiter, were wrong. In any event, they are not binding on the House of Lords.

In *The Amazone*,³⁵ also relied on by the appellants, the key to the decision was that the applicant was the registered owner of the yacht and the claim was in rem, and an order would have had to be made against him to remove his name from the register. That case does not help either party in the present action.

[They also referred to Pollock and Wright on Possession, pp. 20, 27, 131, 145, 163, 166; Halsbury's Laws of England, 2nd ed., Vol. I, p. 724, para. 1196; p. 773, para. 1265; p. 774, para. 1267; *Lincoln Wagon and Engine Co. v. Mumford*³⁶; *The Winkfield*³⁷; *Wilson v. Anderton*³⁸; *Wetherman v. London and Liverpool Bank of Commerce Ltd.*³⁹; *Rogers, Sons & Co. v. Lambert & Co.*⁴⁰ and *The Crimdon*.⁴¹]

To sum up the argument: (1) This was not a contract of bailment. (2) If it was, then (a) no possession or control remained in the bailors; (b) even if some element of possession or control remained in them, it was not the sort of possession or control referred to by Lord Atkin in *The Cristina*,⁴² and (c) even if possession or control remained in them, then, if the claim for

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³⁴ 1 Ex.D. 285.³⁵ [1939] P. 322.³⁶ (1879) 41 L.T. 655.³⁷ [1902] P. 42.³⁸ (1830) 1 B. & Ad. 450.³⁹ (1914) 31 T.L.R. 20.⁴⁰ [1891] 1 Q.B. 318.⁴¹ 35 T.L.R. 81, 82.⁴² [1938] A.C. 485, 490.

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delivery up is abandoned (as the plaintiff company is willing to abandon it), judgment for the plaintiff company would not involve seizure or detention of the bars within Lord Atkin's proposition, and so the action must proceed in respect of the claim for damages for conversion. (3) In any event, the action can go on as regards the 13 bars because once they were sold any element of control or possession in the governments disappeared.

Richard Wilberforce following. The question of control is not material if it is held that there was not a bailment or if in the proceeding it is not sought to recover property in the possession or control of the foreign governments. Lord Atkin's observations in *The Cristina*⁴² were made in relation to a ship. To apply them to chattels generally is not a mere gloss on his words but amounts to transferring them to another field where they have no place. That case applies only to an action in rem, and in other cases retention in the hands of the possessor himself is necessary to bring them within its principles. *The Cristina*⁴³ was a case of requisition, which is not a term of art but usually denotes a temporary possession or control rather than a confiscation: see *McNair on The Legal Effects of War*, 3rd ed., p. 435n. As to the position of state-owned ships, see *per* Lord Wright.⁴⁴ The immunity of ships in the ownership or possession of foreign governments is based on the fundamental characteristic that they are used for public purposes: see *The Crimdon*⁴⁵ and *The Broadmayne*.⁴⁶ The courts disallow process in regard to requisitioned ships and it is in the light of this situation that "control" is spoken of in *The Cristina*.⁴⁷ This conception is not capable of being transplanted on to land and applied to chattels, though a permissible extension of the principle would be to apply it to aircraft.

In a case such as the present it is not a sufficient test to say that the property is in the hands of a person who has no right to deny the title of him from whom he received it and who has to carry out his orders. That does not coincide with what was in the minds of the Lords who decided *The Cristina*,⁴⁸ for the question of title did not arise there. But in a case like the present you create difficulties if you eliminate the conception of title. There may be many persons who have to carry out the orders of a foreign sovereign with regard to property, to whom it would be strange to apply the doctrine of sovereign immunity.

⁴³ [1938] A.C. 485.

⁴⁴ *Ibid.* 512-3.

⁴⁵ 35 T.L.R. 81, 82.

⁴⁶ [1916] P. 64, 77.

⁴⁷ [1938] A.C. 485, 492, 502.

⁴⁸ [1938] A.C. 485.

On the appellants' argument it would apply to a purely contractual right arising out of a contract for the manufacture and delivery of shells by order of a foreign sovereign. Yet it could not apply there, for example, if the manufacturer went bankrupt and his creditors claimed his assets. Other examples might be found in the case of a company controlled by a foreign government; there again the doctrine would not apply. Yet if the principle rested on an unconditional obligation to carry out the orders of a foreign sovereign it would be hard to find any bounds to its application.

Both in civil and criminal matters the courts are accustomed to dealing with elaborate cases of possession: see, for example, *The Jupiter* (No. 3).⁴⁹ To deal with this case on the basis of possession is not strange or artificial. Possession is transferred when an object is given to a bailee to hold on bailment: see Pollock and Wright on Possession, pp. 58, 131. The article in the Law Quarterly Review cited on behalf of the appellants did not take account of that. The possession by the bank is distinct from possession by the governments.

Sir Hartley Shawcross K.C. in reply. The case for the appellants rests mainly on control. But on the question of impleading a foreign sovereign one may find an indirect impleading in respect of property of which the sovereign has neither possession nor control at the time of the suit: see *The Cristina*.⁵⁰ Indirect impleading covers any case where the sovereign is a necessary or proper party to the action and is put in the dilemma that he must either intervene (if need be by leave of the court) or risk some prejudice to his interest in the subject-matter of the suit. In the present case the appellants would have been proper parties and but for the doctrine of sovereign immunity would in the normal course have been brought in by interpleader. It would be strange if the parties most interested in the subject-matter were not proper parties to the action. But their interest is sufficient: see *Dollfus Mieg et Compagnie S.A. v. Bank of England*.⁵¹ It is an instance of indirect impleading which has scope beyond an action in rem.

As to the question of bailment, the bank was the custodian of the bars for its customers, although a possible view is that though it was not the bailee in the sense of being bound to return specific bars to specific customers it was bailee for the pool of gold for all its customers.

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⁴⁹ [1927] P. 122.⁵¹ [1951] Ch. 33, 41.⁵⁰ [1938] A.C. 485, 491, 505.

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The American cases relied on by the company are not binding on the House of Lords and, in any event, turn on their own facts. Perhaps they exemplify a more liberal view from the subject's standpoint so that actions which would have been stayed here have not been stayed in the United States. The key to those cases lies in the degree of control left in the bailor. There is nothing in the doctrine of sovereign immunity in English law to suggest that the sovereign's interest must be exclusive.

As to possession, although it is true that possession cannot reside in two persons who have adverse claims, the argument for the company involves too strict an interpretation of the peculiar English doctrine of possession based on the old forms of action. It is an over-refinement to say that a person who has had possession loses it the moment he places it in the temporary custody of some person, not his servant, to hold it safe. This is not supported by English authority and is contrary to the rule of international law. Roman law has had a great influence on the law of bailment: see Halsbury's Laws of England, 2nd ed., Vol. I, p. 725, para. 1196. Considering possession broadly one can have regard to the principles of Roman law. A bailee did not have the animus to hold as owner and so he had not got possession although he held the corpus: see Buckland's Textbook of Roman Law, 2nd ed., pp. 196, 467, 500. The true view is that a bailor with an immediate right to possession has possession. Although the trover and detinue cases are not conclusive on this matter a bailor can sue in trover and detinue when he has an immediate right to possession and the bailee is his delegate. [He referred to *The Arantzazu Mendi*⁵²; *Government of the Republic of Spain v. The Arantzazu Mendi*⁵³; *Ancona v. Rogers*⁵⁴; *Lincoln Wagon and Engine Co. v. Mumford*⁵⁵ and Holmes on The Common Law, p. 235.]

As to control by the foreign sovereign, the shipping authorities are not inapplicable to the present case and the second limb of Lord Atkin's observations in *The Cristina*⁵⁶ does not apply to ships only. One can have control of a chattel apart from possession. In the user of bars of gold the significant thing is how they shall be employed, whether as security or as a medium of exchange or as a symbol of value. In this respect the appellants controlled the gold and it does not matter how it was kept. It is an offence to common sense to say that a foreign sovereign who

⁵² [1938] P. 233, 236, 240-1, 248;
(C.A.) [1939] P. 37.

⁵³ [1939] A.C. 256, 263.

⁵⁴ 1 Ex.D. 285.

⁵⁵ 41 L.T. 655.

⁵⁶ [1938] A.C. 485, 490.

in the ordinary course of dealing with such things as gold puts them into the custody of some other person loses his right of immunity. For example, while he is staying at an hotel he may deposit jewellery in the hotel keeper's safe. There has never been a case in which an argument such as the company's has succeeded.

If it is claimed that damages is merely an alternative remedy the court should not allow this. If it were allowed it would drive a horse and cart through the doctrine of sovereign immunity. In the present case the claims for delivery up and for damages are alternative remedies in the same cause of action. To order the bank to pay damages because it will not deliver up something which it holds for the foreign sovereigns is an interference with the rights of the foreign sovereigns. If it paid damages it could assert a title to the gold against the governments. The effect of the company's argument is that at some stage or other the governments must prove their title and that is just what they are not to be forced to do. Such a proceeding has the indirect result of putting pressure on the bailee to deliver up the goods, and this device would largely destroy the possession and control of property which a sovereign can exercise through a bailee. The court can neither award damages nor order delivery up.

Only in the case of the 13 bars which have been disposed of, thereby destroying the possession and control of the governments, may damages perhaps be awarded. But if the respondents were right in their main contention, no bailee in the position of the bank would be safe from an action for damages whether he dealt with the goods in accordance with the bailment or not.

Their Lordships took time for consideration.

1952. Feb. 25. EARL JOWITT. My Lords, Dollfus Mieg et Cie., the respondents to this appeal, are a French company who before the outbreak of war in 1939 had acquired as their property 64 bars of gold. These bars of gold were stored in a bank at Limoges in a special vault which the respondents had hired. When the German armies overran Limoges they captured the 64 bars in question and carried them off to Germany; and when the American armies occupied that part of Germany at which the bars had been stored by the Germans they were taken possession of by the Americans and brought to Frankfurt, where they remained for some time in American custody. Negotiations followed between the various allied governments as to the course

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to be followed with gold captured by the allied armies in Germany and finally a treaty was signed between 18 allied governments. Nothing, I think, turns for present purposes on the precise terms of that treaty—it is sufficient to say that the 64 gold bars in question, together with other gold bars, passed into the possession of the American, British and French Governments. These governments established a “Tripartite Commission for the “Restitution of Monetary Gold” to deal with gold taken from Germany on their behalf.

In March, 1948, a “gold set-aside account” was opened at the Bank of England in accordance with the terms of a letter from H.M. Treasury dated March 9, 1948, and the bank’s reply dated March 11, 1948. The trial judge set out the terms of these letters in his judgment and came to the conclusion that the effect of the letters was to create a contract between the Bank of England and the American, British and French Governments. He regarded the Treasury as a mere intermediary acting on behalf of the governments who were to operate the account. I think he was amply justified in reaching this conclusion.

The terms of the contract must be construed in the light of the course of business which was well known to all the contracting parties. Ever since 1940 the Bank of England in operating a gold set-aside account had not kept separate the gold belonging to one customer from the gold belonging to another customer, though the customers’ gold, considered globally, was kept separate from gold belonging to the bank itself. Under the “gold set-“aside” account as managed in 1948 the bank on receiving gold in whatever form from a customer would weigh the gold and assay it and, if necessary, bring it up to the standard of fineness for good delivery in the London Bullion Market. Until the completion of weighing and assay the particular gold would be kept separate in the name of the depositor, but once these operations were completed there would be recorded in the books of the bank the number of ounces of fine gold comprised in the deposit, and the depositor would be entitled to receive from the bank the number of ounces of fine gold so ascertained, less charges. The customer would, however, no longer be entitled to receive any particular bars of gold in satisfaction of his contract. The contract, in short, once weighing and assaying had been completed, created a relationship between the depositor and the bank closely resembling that of debtor and creditor, except that the bank’s obligation was to be discharged by the handing over of the requisite number of ounces of fine gold.

During the hearing in your Lordships' House we had produced for our inspection the bank's account. This is headed "Bar "Gold set aside o/a His Majesty's Treasury o/a the Governments "of the United States, the United Kingdom and France." The account opens under date May 20/April 19-23, 1948, with an item "imported from B.N. Suisse Berne," and this is entered as "578700 oz. fine."

The 64 bars, the subject-matter of these proceedings, were dealt with on a different basis. By a letter of July 10, 1948, a Monsieur Rueff, who was acting on behalf of the French delegation of the Inter-Allied Reparations Agency, wrote to the Secretary-General of the Tripartite Commission asking that the 64 bars should be preserved in their present form, and, as a result of this request, the Secretary-General of the Tripartite Commission, in a letter dated July 16 addressed to the Bank of England, asked if the bank would be able and willing to "have these bars set "aside intact on arrival, if they can be identified, pending receipt "of a further communication from the Commission." By a letter of July 19, 1948, the Bank of England answered as follows: "The proposal which you make is acceptable to the Bank of "England provided that at the time we receive the authority of "the Commission to hold the gold at the disposal of the Bank "of France we also receive instructions from them to ship the "gold from London."

Shortly after these letters the bank received the 64 bars and, as requested, set them aside. The weighing and assaying of the 64 bars was not completed until shortly before October 25, 1948, and their gold content was on that day entered in the "gold set- "aside account" as 25,679.605 fine ounces. This entry was, however, plainly not intended to terminate the bank's obligation to hold the specific 64 bars, for the letter of October 25, 1948, from the bank to the Tripartite Commission recording the above facts concludes with this sentence: "I would mention that in "view of the circumstances outlined in your letter under reference "these bars have been temporarily segregated pending the receipt "of instructions as to their disposal."

In these circumstances, I think that the correct view is that the letters of July coupled with the sending of the 64 bars to the bank constituted a bailment of the 64 bars "pending receipt of "a further communication from the Commission," and that the contract of bailment continued, notwithstanding the entry of October 25. If there had been no special arrangement constituted

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by the July letters I should have been of opinion that the bailment of the individual bars had been terminated when the account was credited with the fine gold content.

The writ in the action in which Dollfus Mieg were plaintiffs and the Bank of England were defendants was issued on October 18, 1948, and claimed delivery of the 64 bars and an injunction restraining the defendants from parting with the bars; and on November 2 the plaintiffs asked for an injunction restraining the defendant bank from selling or parting with the possession of the 64 bars. On the same day the bank served notice of motion asking the court to set aside the writ on the ground that the 64 bars were in the possession or control of the Governments of the United States of America, the Republic of France and the United Kingdom, and upon the further ground that the two foreign governments who declined to submit to the jurisdiction were directly or indirectly impleaded. On March 8, 1949, the writ was amended by the insertion of a claim for damages for detention and conversion of the 64 bars.

The respondents Dollfus Mieg by an affidavit sworn on their behalf by Frederic Engel on October 16, 1948, asserted that the 64 gold bars in question had been purchased by them and remained their property at all material times; and an affidavit sworn by Mr. Rootham, an assistant chief cashier in the employment of the Bank of England, set out the terms of the letters of March 9 and 11, 1948, and was relied upon by the bank in support of their application to stay all further proceedings. It is the fact that this latter affidavit made no reference to the July correspondence. Further affidavits were put in establishing the fact that the Governments of the United States of America and of the Republic of France were not willing to submit to the jurisdiction. Mr. Engel made a further affidavit dated December 17, 1948, referring to and exhibiting the letter from Mr. Rueff of July 10, 1948, and this produced a further affidavit by Mr. Rootham exhibiting the two letters of July 16 and 19, 1948, respectively.

I have briefly referred to all the evidence that was available to Jenkins J. when the case was heard before him in March, 1949. Unfortunately the fact that by some mistake 13 of the 64 bars had been delivered to purchasers outside the bank between December 30, 1948, and January 26, 1949, had not then been discovered, so that the case before the trial judge proceeded on the basis, which everyone believed to be the fact, that the 64 bars were still intact in the bank's possession. If discovery had been ordered it is possible that this fact would have been brought to

light; but, whether this would have been so or not, it seems to me desirable that in a case of this sort an order should be made for full disclosure of documents before the hearing. In the present case, as is apparent from the judgment of the Master of the Rolls, documents were produced before the Court of Appeal which had not been produced before the trial judge, and in your Lordships' House still further documents were produced which had not been available to either of the courts below. This would have been avoided if full discovery had been given.

Jenkins J. delivered his reserved judgment on April 6, 1949, setting aside the writ.⁵⁷ He regarded the three governments as being in possession or control of the 64 bars of gold, which were held for their public purposes, and regarded the action against the Bank of England as being an attempt to sue indirectly the three governments, two of whom he treated as foreign sovereign States. He decided that so long as property is in the possession or control of a foreign sovereign State no court in this country can entertain proceedings which, if successful, would result in any interference with the foreign sovereign State's exercise of such possession or control, whether directly (as by removing the property from the custody of an agent to whom the foreign sovereign State has entrusted it), or indirectly (as by casting in damages for wrongful possession an agent through whom the foreign sovereign State is exercising its possession or control).

Dollfus Mieg appealed to the Court of Appeal, and before the conclusion of the hearing in that court the fact that by some error 13 of the 64 bars had been delivered on the market was revealed. I have not overlooked the fact that the disposal of the 13 bars did not take place until after the issue of the writ. This difficulty could have been surmounted by the issue of a further writ after January 26, 1949, and all the parties have asked us to treat the case as though the writ had been issued on the later date. My Lords, it is, I think, clear that so treating the date of the writ the action in regard to these 13 bars must be allowed to proceed, for in regard to them it may well be argued that no question any longer arises of interfering with the possession or control of a foreign sovereign State. I do not think it would be proper for us to come to any final conclusion as to this matter. It is not for us to try the case. We have merely to decide at this stage whether the action should or should not be allowed to go for trial, and in so far as the 13 bars are concerned I certainly think that

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the action should be allowed to go on. All the members of the Court of Appeal thought, however, that the disposal of the 13 bars made it inevitable that the action should be allowed to proceed as to the entire 64 bars. The Master of the Rolls⁵⁸ thought that the disposal of the 13 bars had "destroyed at a single blow" "the whole premiss on which the judgment below proceeded." Somervell L.J. would have agreed with the judgment of Jenkins J. but for the disposal of the 13 bars. He states his view as follows⁵⁹: "The 64 bars for all relevant purposes at all material" "times were in the pool. Thirteen of them were disposed of," "and the whole 64 might have been disposed of without instruc-" "tions from or reference to the Tripartite Commission. In these" "circumstances it seems to me impossible to hold that these" "64 bars were in the possession or control of the three govern-" "ments." Cohen L.J. agreed with Somervell L.J. My Lords, I cannot agree with this reasoning. If the bars were in the possession or control of the governments I cannot think that the fact that by some error of internal management 13 bars were disposed of alters the position except as to those 13 bars. For the question of possession or control must depend on the terms of the contract under which the bars in question came to the bank; if possession or control was retained by the governments that position is not altered by the fact that through an error 13 bars were disposed of in breach of the contract. Unless the disposal of the 13 bars throws some light upon the terms of the contract it seems to me to be irrelevant in regard to the remaining 51 bars. I have already stated my view that in regard to the 64 bars there was a contract of bailment and an obligation was thereby imposed on the bank to keep these bars separate and intact and not to allow them to become merged in the general pool of customers' gold pending the receipt of further instructions. The Master of the Rolls, differing in this respect from the other judges in the Court of Appeal, thought that Jenkins J. had come to an erroneous conclusion on the facts as presented to him. He thought that from and after the time at which the 64 bars were delivered to the bank the governments no longer had such a degree of possession or control as would justify them in asking to have the action stayed.

After the decision of the Court of Appeal had been given, and in view of the then contemplated appeal to your Lordships' House, the two foreign governments applied to be added as

⁵⁸ [1950] Ch. 333, 344.

⁵⁹ Ibid. 364.

defendants to the action. An order was made that they should be so added, with the result that we have had the advantage of hearing counsel on their behalf as well as counsel for the Bank of England in support of the appeal.

My Lords, I think that the question for our decision is whether the foreign governments, notwithstanding the delivery of the 64 bars to the Bank of England, still retained such an interest in the bars as to entitle them to have the action stayed.

The decided cases which illustrate the way in which the principle of immunity has been applied by our courts are largely concerned with ships and actions in rem. Lord Wright in *Compania Naviera Vascongado v. The Cristina*⁶⁰ refers with approval to the observation of Sir Hardinge Giffard S.-G. in his argument on *The Parlement Belge*⁶¹: "The privilege depends on the immunity of the sovereign, not on anything peculiar to a ship of war, though it seldom arises as to anything else, because hardly anything belonging to a sovereign in his public capacity, except a ship of war, ever goes wandering into the jurisdiction of foreign courts." In his judgment in *The Parlement Belge*⁶² Brett L.J. deduces the following principle from the decision of the English and United States cases: "The principle to be deduced from all these cases is that, as a consequence of the absolute independence of every sovereign authority, and of the international comity which induces every sovereign State to respect the independence and dignity of every other sovereign State, each and every one declines to exercise by means of its courts any of its territorial jurisdiction over the person of any sovereign or ambassador of any other State, or over the public property of any State which is destined to public use, or over the property of any ambassador, though such sovereign, ambassador or property be within its territory, and, therefore, but for the common agreement, subject to its jurisdiction." In that case the Belgian Government was the owner of the ship: "But the rule is not limited to ownership. It applies to cases where what the Government has is a lesser interest, which may be not merely not proprietary but not even possessory," *per* Lord Wright, *The Cristina*.⁶³ Lord Atkin stated the principle in the following terms⁶⁴: "The foundation for the application to set aside the writ and arrest of the ship is to be found in two propositions of international law engrafted into our domestic

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⁶⁰ [1938] A.C. 485, 510.⁶³ [1938] A.C. 485, 507.⁶¹ (1880) 5 P.D. 197, 202.⁶⁴ *Ibid.* 490.⁶² 5 P.D. 197, 214-5.

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“law which seem to me to be well established and to be beyond dispute. The first is that the courts of a country will not implead a foreign sovereign, that is, they will not by their process make him against his will a party to legal proceedings whether the proceedings involve process against his person or seek to recover from him specific property or damages. The second is that they will not by their process, whether the sovereign is a party to the proceedings or not, seize or detain property which is his or of which he is in possession or control. There has been some difference in the practice of nations as to possible limitations of this second principle as to whether it extends to property only used for the commercial purposes of the sovereign or to personal private property. In this country it is, in my opinion, well settled that it applies to both.”

My Lords, I think it probable that Lord Atkin inserted the words “or control” in his second proposition so as to make it wide enough to cover those cases which had been cited to him in argument in which the foreign government had requisitioned or directed a ship without depriving the owners of their possession. This is, I think, merely an illustration of one of those interests “lesser than a proprietary interest or even than a possessory interest” to which Lord Wright referred; there is, I think, no special doctrine applying to ships which does not equally apply to gold bars.

We were pressed in argument with the difficulty which might arise if it were alleged that a foreign sovereign whilst in this country seized goods in this country without any legal justification and then made a bailment of such goods to a private person within the jurisdiction. We are not dealing with any such case at present and I should prefer not to make any pronouncement in regard to such a case. In the present case the foreign governments had undoubtedly been in possession of the gold bars before they were sent to this country. They decided in the public interest to send these gold bars to the Bank of England in London. In my view the bank became bailees of these bars and were bound to keep them intact pending further instructions.

In the case now before us the action is an action in personam and not an action in rem. I do not think that the foreign governments can be said to be directly impleaded; neither do I think they are being indirectly impleaded, for the present action is an action in personam brought against the Bank of England.

The word “control” in the second limb of Lord Atkin’s proposition is a word of vague import, and I think it fallacious to

treat Lord Atkin's words as though they were the words of a statute. I do not think that the word "control" is apt in the present context. The bars of gold did not require any treatment or anything in the nature of management. All that was required was that they should be left intact and undisturbed in the vaults of the bank.

Under these circumstances I think we should consider whether the foreign governments had such a possessory right in relation to the gold bars as to entitle them to ask that this action should be stayed. Under English law, where there is a simple contract of bailment at will the possession of the goods bailed passes to the bailee. The bailor has in such a case the right to immediate possession, and by reason of this right can exercise those possessory remedies which are available to the possessor. The person having the right to immediate possession is, however, frequently referred to in English law as being the "possessor"—in truth the English law has never worked out a completely logical and exhaustive definition of "possession." We are bound to decide this case in accordance with the English law and we have no evidence of any other system of law; yet it is germane to remember that the English law has incorporated the doctrine of State immunity from international law. It would be an unsatisfactory position if the extent and ambit of this doctrine were to depend on the special and peculiar doctrines of each jurisdiction in relation to "possession," with the result that differing results might be arrived at according to whether the case was governed by English law or, for example, by Scottish law. The basis of the rule was explained by Lord Atkin in the case of *Government of the Republic of Spain v. The Arantzazu Mendi*⁶⁵ as being intended either to secure reciprocal rights of immunity or to avoid the risk of injured pride if jurisdiction is sought to be exercised, or to avoid the risk of belligerent action if government property is seized or injured; and the distinction between "possession" and the "immediate right to possession" would have no bearing upon these considerations.

I agree with Jenkins J. in thinking that the fact that the foreign governments had the immediate right to possession of the 64 bars made it impossible, consistently with the established principle of English law relating to State immunity, for relief to be given in this action by ordering the delivery up of the bars or by granting an injunction restraining the bank from parting with

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their possession; for if either of these courses were taken it would be necessary for the foreign governments to take proceedings in this country if they wanted to recover the gold here.

The doctrine of immunity should not, I think, be confined to those cases in which the foreign sovereign was either directly in possession of property by himself or at least indirectly by his servants, for if it were so confined the doctrine would not be applicable to the case of any bailment. I can find nothing in any decided case to support any such limitation. We have been referred to certain American cases, which I have considered with care, but I do not think that any of these cases affords any justification for such a limitation of the doctrine of sovereign immunity as is here sought to be introduced.

Jenkins J. in the course of his judgment, to which I would desire to express my indebtedness, expresses the matter as follows⁶⁶: “A foreign sovereign State (unless embodied in a “personal sovereign visiting this country) cannot, so far as I can “see, be in actual physical possession of property here otherwise “than by its servants. Accordingly, if actual physical possession “by a foreign sovereign State were essential to immunity on the “score of possession by such State, immunity on that ground “could only be claimed in respect of property in this country in “the actual physical possession either of some personal sovereign “or of a person who could be shown to be in the strict sense a “servant of a foreign sovereign State (so as to make his possession “that of his master) or else to be himself entitled to diplomatic “immunity. The application or exclusion of the principle of “immunity would thus be made to depend on nice distinctions “respecting the particular mode in which a foreign sovereign “State might happen to exercise dominion over property brought “by it to this country in its possession or control. For instance, “if gold were brought to this country by a foreign sovereign State “to be applied in the purchase of goods for the public purposes “of that State and placed in the hands of a servant of the State “concerned to be applied in making such purchases in accordance “with its directions, the gold would be protected by the principle “of immunity on the score of possession by the foreign sovereign “State, irrespective of any immunity from process the servant “might be entitled to claim in his own person. If on the other “hand gold brought to this country by a foreign sovereign State “for similar purposes was deposited by it with a banker or other

⁶⁶ [1949] Ch. 369, 389.

“ agent for safe custody and disposal in accordance with its
 “ directions, the gold would at once become exposed in the hands
 “ of the banker or other agent to any adverse claims there might
 “ be, and the principle of immunity would afford no protection
 “ from actions brought by third parties against the banker or
 “ other agent for the purpose of establishing such claims. I can-
 “ not think it would be right to make the application or exclusion
 “ of the principle of immunity (based as it is on substantial
 “ reasons of policy) turn upon nice distinctions of this kind.”

Although I agree with the observations of Lord Maugham in *The Cristina*⁶⁷ that the doctrine of immunity should not be extended, yet I think that we should unduly limit the doctrine if we were to decline to apply it to any bailment which might be made by or on behalf of the foreign sovereign in which the action is brought against the bailee. If it were so limited the result would be that if the foreign sovereign deposited his bag or his jewellery with the railway or with the hotel or with the bank, proceedings could be taken against the bailee, claiming the delivery of the article which had been deposited by or on behalf of that sovereign.

It remains to consider whether the fact that the writ, by reason of the amendment, claims damages for conversion should be allowed to make any difference. The only act of conversion in respect of the 51 gold bars which can be relied upon is the fact that the Bank of England refused to deliver any of the gold bars which they were holding for the three governments to the respondents. If the bank were ordered to pay damages representing the value of the gold bars, then, on payment, they would acquire the title of the respondents to the gold and could set up that title against their bailors, the three governments. This would result in an interference with the rights of the three governments, who would be obliged, if they wanted to recover the gold, to submit to the jurisdiction by starting proceedings as plaintiffs in our courts. Moreover, if the court cannot order the bank to deliver the gold bars to the respondents, it is difficult to see how the court can order the bank to pay damages for not so delivering the gold bars.

On the whole, therefore, I come to the conclusion that the action should be allowed to continue as to the 13 bars only.

With regard to the question of costs, I think that all orders already made as to costs should be allowed to stand and that in relation to any steps in these proceedings in which orders as to

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⁶⁷ [1938] A.C. 485, 519.

H. L. (E.) costs have not already been made, including this appeal and the previous application by the governments to be joined as defendants, each party should pay their own costs.

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LORD PORTER. My Lords, in this action the respondents, as plaintiffs, sued the Bank of England in detinue for the recovery of 64 bars of gold which were at one time their property but were seized by the Germans in the course of the late war, taken by them to Germany and found and taken possession of by the Allies. The bars were then transferred to a Tripartite Commission set up by the French, American and English Governments for the purpose of recouping the losses suffered by their countrymen as a result of the depredations of the Germans. For the purpose of the present appeal the appellants are prepared to accept the view that the property in the bars remains where it originally was, viz., with the respondents.

Undoubtedly the bars were at one time in the possession of the three governments and were entrusted by them to the Bank of England. The question for your Lordships is whether the plaintiffs can sue the bank or whether that body can rely upon the immunity accorded to a sovereign state on the ground that the bars are still in the possession or control of the governments which deposited them, and whether the result of allowing the case to proceed would be to implead such a State or States.

The Crown of this country is not a party to the appeal inasmuch as, since the Crown Proceedings Act, 1947, the British Government can claim no greater protection than that accorded to a private individual, but the United States of America and France are still protected by the doctrine of State immunity where that doctrine applies.

The facts have been set out by Jenkins J. in the court of first instance, by Cohen L.J. in the Court of Appeal, and by the noble Earl on the woolsack in your Lordships' House. I need not repeat them.

Jenkins J. stayed the action, but when he gave his judgment he was unaware that after action brought the bank had delivered 13 of the 64 bars to third parties. The majority of the Court of Appeal, as I understand them, would have reached the same conclusion as the learned judge if they had had to depend on the same material, but thought that the disposal by the bank of the 13 bars destroyed the argument for staying the proceedings in respect of the whole of the 64; Somervell L.J.'s view being that the bank had ceased to keep them separate because, though

it had stacked them in two special trucks and placed a notice that they were not for disposal, it had failed to enter a warning note on the cards relating to the consignment in question and that the entry of the note was a precaution which must be observed if the bars are to be regarded as separated from the pool. The Master of the Rolls went further and thought that even without the additional evidence a case had been made for allowing the action to proceed against the bank. In his view it was not established that the bank were ever under a duty to keep the bars separate and, even if they were, he agreed with the other members of the court in thinking that they had not done so.

This portion of the case involves a question of fact or inference from fact and, in my view, the inference drawn by the Court of Appeal is not justified. The correspondence and affidavit evidence show that though since 1940 it has not been the practice of the bank, except as the consequence of a special arrangement, to keep a customer's gold separate from that of other customers, yet in this special case they agreed to do so and took steps to carry out their agreement. I cannot read the letter dated October 25, 1948, from the bank to the Tripartite Commission as bearing any other meaning. The suggestion that it means "We have in fact but without obligation held the bars separate" but that separation ceased once we had assayed," is inconsistent with that letter, and indeed with the general import of the correspondence. The entry in the account crediting it with the value of the bars and the charges made for assaying do not conflict with this view. It is but an account-keeping device and it would be odd if the bank, knowing that an action had been brought against it and, indeed, as a result of that fact, were to change the whole relationship between itself and its customer.

But it is said H.M. Treasury was the customer and the Tripartite Commission was merely empowered to draw on the account through certain specified persons nominated by the Treasury. I cannot take that view. The Treasury was no doubt the instrument by means of which the relationship between the bank and the Tripartite Commission was brought about; the Commission, however, were the only body entitled to deal with it and, in fact, through their secretary, gave instructions to the bank and were informed by its officials of the action taken. It is true that instructions as to the operation of the account are, in the words of Sir Edward Rowe Dutton, in his letter of March 9, 1948, entrusted to certain named representatives, but this arrangement is limited to instructions for the operation of the

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account and leaves the Commission to make arrangements through its secretary as to the disposal of the bars. In fact, the Commission gave such instructions and the bank accepted them.

Had, then, the 64 bars remained intact, I find myself in agreement with the original judgment of Jenkins J.

Does it, then, make a difference that in error 13 bars were treated as if they were part of the pool from which gold could be drawn for customers generally instead of being treated as confined in use to one particular customer? The reason for the decision of the majority in the Court of Appeal is perhaps most clearly exemplified in the words of Somervell L.J. He says⁶⁸: "The authorities of the bank responsible for the correspondence with the Tripartite Commission intended that these bars should be kept apart from the pool and held as individual bars for the three governments. Some steps were taken to this end, but, as the facts show and as is admitted, one necessary step was not taken. The 64 bars for all relevant purposes at all material dates were in the pool." My Lords, with all due respect, I am unable to concur with this view. In fact, the bars were kept separate in two trucks and a notice was placed on them to indicate that they were to be used only for a particular purpose. It is true that one precaution, viz., an entry on the cards, which would have been helpful in avoiding a misuse of the bars and might have prevented it, was not taken, but that neglect did not cancel the instructions of the Tripartite Commission or the bank's acceptance of them. So long as the bars remained in the possession of the bank, a failure to take all possible precautions or indeed even a failure to take all reasonable precautions to prevent the bars being dealt with in the ordinary course, is not effective to destroy the conditions on which the bank were instructed to hold the bars and on which they agreed that the bars should be held. Misdelivery may in certain cases put an end to a claim to possession, though it will not in the normal case destroy a right of property. On the other hand, negligence in failing to take all possible steps to see that an arrangement which had been made is carried out does not alter the fact that all bars in the possession of the bank remained in their possession subject to the terms upon which they were deposited. In such a case, however, misdelivery does, in my view, affect the position, since, as regards the 13 bars, it can no longer be asserted that they are in the possession of the three governments through their bailees, the bank.

⁶⁸ [1950] Ch. 333, 364.

That the bank are bailees is, I think, not open to doubt, but that fact leaves undecided the difficult and interesting question: Can those who assert a possessory title to goods but make no claim to the property in them be said still to retain possession after they have entrusted those goods to a bailee to hold on their behalf? There is no direct English authority which decides the point, much less one binding on your Lordships. The nearest, I suppose, is *Ancona v. Rogers*,⁶⁹ a decision on the words "apparent possession" contained in section 1 of the Bills of Sale Act, 1854 (17 & 18 Vict. c. 36). In delivering the judgment of the court in that case Mellish L.J. said⁷⁰: "There is no doubt that a bailor, who has delivered goods to a bailee to keep them on account of the bailor, may still treat the goods as being in his own possession, and can maintain trespass against a wrongdoer who interferes with them. It was argued, however, that this was a mere legal or constructive possession of the goods and that in the Bills of Sale Act the word 'possession' was used in a popular sense and meant actual or manual possession. We do not agree with this argument. It seems to us that goods which have been delivered to a bailee to keep for the bailor, such as a gentleman's plate delivered to his banker, or his furniture warehoused at the pantechicon, would, in a popular sense, as well as in a legal sense, be said to be still in his possession." It is urged, however, that these "dicta" are obiter," and wrong; that, in any case, the judgment was not concerned with "possession" as opposed to property and that the true view is that the rule applies only in a case where the bailor has the property and the bailee has the possession. In such a case it is maintained that the bailor can sue in right of his property but that an action in right of possession belongs to the bailee only. This contention may be true where the bailor has no right to demand an immediate return of the article at his will, but the better opinion is, I think, that where the bailor can at any moment demand the return of the object bailed, he still has possession. See Pollock and Wright on Possession (1888), p. 166; Beal on Bailments (1900), p. 40; and Halsbury's Laws of England, 2nd ed., Vol. I, p. 775, sub tit. Bailment. In each of the authorities referred to the right of the bailor is limited to a case of gratuitous bailment, a requisite which, in my opinion, is fulfilled in the present case. The bank held the bars, without any right of lien, at the will of the Commission.

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⁶⁹ (1876) 1 Ex.D. 285.⁷⁰ Ibid. 292.

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The Commission being, in my opinion, as I have indicated, still in possession of 51 of the bars, it has to be determined whether they or the bank are entitled to immunity from suit instituted by the respondents. Such an action, it is argued on behalf of the latter, can be brought and determined without in any way impleading the two governments or affecting their rights. It is accepted by both parties that the principles to be considered are those laid down by Lord Atkin in *Compania Naviera Vascongado v. The Cristina*.⁷¹ In the relevant passage he says, in regard to those principles: "The first is that the "courts of a country will not implead a foreign sovereign, that "is, they will not by their process make him against his will a "party to legal proceedings whether the proceedings involve "process against his person or seek to recover from him specific "property or damages. The second is that they will not by their "process, whether the sovereign is a party to proceedings or not, "seize or detain property which is his or of which he is in pos- "session or control." As, in the view which I have expressed, the three governments are in possession of the 51 bars, it is not necessary to inquire what is the exact meaning to be attributed to the word "control." It is enough that they are in possession and an attempt is being made to interfere with that possession.

But it is said that the decision in *The Cristina*⁷² is not of universal application but applies only to an action in rem and that, in other cases, retention in the hands of the possessor himself is required to bring its principles into force. It is true that the matter then under consideration was a ship and that a decision in respect of a ship is an action in rem and would therefore bind all the world and not the parties only, but the observations of those members of your Lordships' House who sat to decide the case were by no means confined to actions in rem. They extended to the case of all chattels: see, in particular, the observations of Lords Maugham and Wright. The principle, in my opinion, is a wider one and embraces any chattel, whether the subject of an action in rem or not. No doubt the doctrine should, as Lord Maugham said in *The Cristina*,⁷³ be narrowly watched, but it has always to be remembered that governments must act through servants or agents and often through bailees, and it would destroy the efficacy of the doctrine if it were strictly confined to personal possession.

⁷¹ [1938] A.C. 485, 490.⁷³ Ibid. 518.⁷² [1938] A.C. 485.

I do not myself find any great enlightenment in the American cases on the subject under discussion. They all, I think, turn on who was in possession at a particular time and depend on their own facts.

So far I have dealt with the claim of the respondents to recover the gold bars themselves and with their claim to an injunction. Sir Andrew Clark, however, on their behalf, expressed himself as willing to give up that claim and rest on his right to recover damages for conversion. Such a claim, he maintained, neither impleaded the sovereigns nor involved a seizure of their property. It was merely a claim for damages against the bank. But if the bank were ordered to pay damages to the respondents, Messrs. Dollfus Mieg et Cie.'s right of property would in law be transferred to them on their paying the damages awarded, and it would follow that, if the Tripartite Commission required the bank to return the bars, the bank could refuse to do so, relying on the title acquired by the payment of the damages, and thereby compel the governments either to bring an action or forgo their rights. The object of the rule, it has been said, is that a sovereign may not be compelled either to submit to a foreign jurisdiction or be compelled to go to law to obtain or preserve his right. Such an object might be defeated if this action were permitted to proceed since the bank is in possession and could refuse to surrender the bars and so compel the governments, if so minded, to take action in an endeavour to recover them.

One other point on the question of substance has been mentioned. It was suggested that immunity would only be granted where the country claiming it, in itself, granted reciprocal immunity to other nations. I can find no authority for this proposition, and in any case it was not taken either before Jenkins J. or in the Court of Appeal, and no material of fact has therefore been presented to your Lordships to enable them to deal with the argument or to ascertain whether the two governments concerned grant reciprocal immunity or not. In my view, the argument in any case is not established. The question is, what is the law of nations by which civilized nations in general are bound, not how two individual nations may treat one another. See *per* Lord Maugham in *The Cristina*.⁷³

I would only add that, in my opinion, it might have been possible for the Court of Appeal to refuse to stay the action and allow it to proceed against the bank, and in the course of that

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⁷³ [1938] A.C. 485, 518.

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proceeding to ascertain the true relationship between the bank and the Tripartite Commission. If, as a result of those proceedings, it should have been held that the Commission was in possession or control of the gold bars, the claim to immunity would have succeeded and the action against the bank would have failed. But, in fact, a different course was taken. The three governments, whose interest it was contended took away the jurisdiction of the court to hear the case, applied to your Lordships' House either to be permitted to attend and argue the case before your Lordships or to be added as parties. On this application they were given leave to be added in order that they might enter a conditional appearance and claim immunity from the jurisdiction of the courts of this country to deal with the matter. The two governments concerned then applied to Romer J. to be added. They were given leave and were so added. Thereupon they filed further evidence and again applied that the action might be stayed. Both the learned judge and the Court of Appeal refused to stay, and from that refusal the two governments appeal to your Lordships' House. Had the action continued to be carried on against the bank only, it might have been possible to ascertain all the facts more fully and accurately, and if it was found, after further steps had been taken, that the bank had rightfully claimed immunity on the ground that the foreign governments would be implicated or their rights invaded, the action could then have been stayed. As it is, the two governments are parties, and it is therefore incumbent on your Lordships here and now to stay or refuse to stay the action. In these circumstances and on the material facts before your Lordships, I would agree with the noble Earl on the wool-sack in staying the action as to the 51 bars but allowing it to proceed in respect of the 13.

LORD OAKSEY. My Lords, I agree.

LORD RADCLIFFE. My Lords, I do not think that the difficulty of this case lies in deciding what relation the Bank of England bore to the Tripartite Commission in respect of the 64 gold bars that were delivered to the bank. No doubt it was difficult to establish the facts upon which this relation depended, primarily because the bank themselves seem to have known less than they might have about the real nature of their own proceedings. It was this uncertainty that led the Court of Appeal to take what I regard as a mistaken view of the facts. But when those facts

are finally established and can be surveyed in their proper setting it seems to me reasonably clear that both at the date of the issue of the writ and at the dates of the launching of the relevant motions in this action the bank were holding such of the bars as they then retained as mere deposites on behalf of the Commission. These bars were held for the time being in specie to the order of the Commission, subject to the stipulation that instructions placing them at the disposal of the Bank of France were not to be given unless accompanied by instructions from that bank to ship at once from London. This deposit amounted to no more than a bailment at will.

I think that this view of the facts is the one which in substance commends itself to all your Lordships, and I do not think it necessary to say anything more about it. It follows that I do not attach to the disposal of the 13 bars of the original consignment which disappeared from the vault the same significance as was attached to it by all the members of the Court of Appeal. That incident can mean only one of two things. Either the fact that it happened at all is itself such cogent evidence that the bars were not held in specie that it ought to outweigh all other evidence that they were, or the removal of the bars was merely something which ought not to have been done and the doing of which was contrary to the arrangement which the bank had come to. If the latter was all that the incident amounted to it is of no importance for our purpose. In my opinion the latter was all that the incident did amount to.

The important and difficult question is whether, on that basis of fact, anything ought to be done to arrest the plaintiffs' action. For the time being I will confine myself to the action so far as it relates to the 51 gold bars which are now all that the bank retain. Does that action also offend against the rule of immunity of independent sovereigns which forms part of our municipal law? I treat the Commission as no more than three sovereigns joined in a particular relation. It is, of course, beyond question that there is some such rule and that it has been expounded or applied in a number of decisions in our courts. But I do not feel confident that it can be, or that it ought to be, expressed in any very precise language: and I do not at all share the view, which rather dominated the argument of this appeal, that a definition of the rule has now become, as it were, graven on tables of stone and that those tables consist of the speech of Lord Atkin in *Compania Naviera Vascongado v. The Cristina*.⁷⁴ For myself I think that

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the range and purpose of our rule is expressed as well as may be in Dicey's *Conflict of Laws*, 6th ed., p. 131: "The court has . . . no jurisdiction to entertain an action or proceeding against (1) any foreign sovereign. . . . Any action or proceeding against the property of [a foreign sovereign] is an action or proceeding against such person." This is the rule which Scrutton L.J. quoted with approval in *The Jupiter*.⁷⁵ The rule so expressed leaves open the question what is an action "against the property of a foreign sovereign" in any particular case. But I am afraid that the abundant argument that we had in this case as to the application of the words "of which he is in possession or control," as used by Lord Atkin,⁷⁶ shows that even his summary leaves open as many questions as it settles. In fact this is not a field in which the law can be set at rest by any neat combination of words. But the rule as expressed in Dicey has this advantage: it does make clear that the property of a sovereign enjoys no immunity in legal proceedings except so far as those proceedings amount in one way or another to a suit against the sovereign.

If the sovereign is actually named as a party to a suit the proceedings identify themselves. Even then I think that it is going too far to say that such a suit must necessarily be arrested. It may depend on the purpose for which the sovereign is made a party. But certainly a special difficulty begins when he is not actually named but the suit is one which may result in a judgment or order that will affect his interest in some piece of property. Even to say that much begs one important question, for it assumes that he has a valid interest in that property: whereas a stay of proceedings on the ground of immunity has normally to be granted or refused at a stage in the action when interests are claimed but not established, and indeed to require him to establish his interest before the court (which may involve the court's denial of his claim) is to do the very thing which the general principle requires that our courts should not do. *The Parlement Belge*⁷⁷ is a leading case on this branch of the law, but it does not offer much help on the particular aspect of it with which your Lordships are now concerned because it was common ground throughout the case that the ship was the public property of the Kingdom of Belgium. What the plaintiffs objected to in that case was the staying of an action in rem about the ship having regard to the uses that she was put to by her sovereign owner. Once it was settled that those uses did

⁷⁵ [1924] P. 236, 243.

⁷⁷ 5 P.D. 197.

⁷⁶ [1938] A.C. 485, 490.

not disqualify the owner from taking advantage of the general rule, it was easy to show that the court's order for the arrest of the ship, if made, would be in substance an order against the sovereign.

But the principle recognized in *The Parlement Belge*⁷⁷ has been carried much further since then. It has been applied even when the sovereign had not claimed, let alone proved, that he was the owner of the property that was the subject of the action. It has been regarded as sufficient to stay the proceedings (1) that he had de facto possession of the property (*The Gagara*,⁷⁸ *The Jupiter*,⁷⁹ *The Cristina*⁸⁰) or such rights of direction and control, without possession, as arise from requisitioning (*The Broadmayne*⁸¹), and (2) that the nature of the proceedings is such that, if successful, they would result in an order of the court affecting that possession or those other rights. *The Cristina*⁸² is, of course, a decision of this House: in it, the other decisions that I have referred to, all unanimous decisions of Courts of Appeal, were reviewed and, as I think, approved: in my opinion they constitute a principle wide enough in application to be conclusive of the present appeal.

The special feature that we have to deal with is that the plaintiffs' action is not an action in rem, it does not come from the Court of Admiralty, it is an action for trover or detinue the basis of which is our common law of tort. Decisions of our courts as to how to apply the principle of immunity to such a case are curiously lacking. Apart from the Admiralty cases, of which I have noticed a few, the other line of authority is to be traced in decisions of the Court of Chancery. These decisions depend essentially on the existence of a trust fund or other item of trust property within the area of jurisdiction of the Chancery courts: given the trust fund or property there is a trust to be administered by the court and it was evidently the belief of the judges who were responsible for the equity jurisdiction that they had a responsibility for administering and in due course determining the rights to such property, even though a foreign sovereign might be known to be a possible or certain claimant to an interest in it. I do not see any other explanation of Lord Hatherley's decision in *Larivière v. Morgan*⁸³ that does not to some extent threaten the principle that has been well established

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⁷⁷ 5 P.D. 197.⁷⁸ [1919] P. 95.⁷⁹ [1924] P. 236.⁸⁰ [1938] A.C. 485.⁸¹ [1916] P. 64.⁸² [1938] A.C. 485.⁸³ (1872) L.R. 7 Ch. 550.

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in the Admiralty cases; and it is in effect the explanation of it that was given by Lord Cairns when the same case was before your Lordships' House (*Morgan v. Larivière*⁸⁴). Perhaps there is no real analogy between the actual possession or rights that existed in the Admiralty cases and the possible claim or interest envisaged by the Chancery cases. Perhaps it is enough to say that the Courts of Chancery treated trust property within their jurisdiction as a domestic responsibility to an extent that would not have commended itself to the Court of Admiralty when dealing with a ship that was found to be within the reach of its process.

The Chancery decisions are well known and of long standing, and it is, I think, easier to treat them as a separate branch of our general law of sovereign immunity or as an exception from the main principle than to accept the cogency of Lord Langdale's explanation in *Duke of Brunswick v. King of Hanover*⁸⁵ that to make a foreign sovereign a party to administration proceedings does not "compel" him to take part in them, for it merely gives him "an opportunity to come in to . . . establish his "interest." But I do not think that this line of authority is of any direct relevance in this appeal. Here there is no trust property and no trust. In my view the Admiralty decisions and the principles to be extracted from them have much more bearing upon the present case.

Now what is the situation of fact here and what does this suit seek to get the court to do? We know that the bars of gold entered this country from the possession of the Tripartite Commission and that the bank hold them merely to the order and at the disposition of that Commission. In those circumstances I regard the gold as in the possession of the Commission for the purpose of the rule that we are considering. The property of a sovereign State, which is an abstraction, must be in the physical possession of some actual person, and I do not see any distinction of substance in a matter of this kind between the possession of a servant of the State and the possession of its bailee when the bailment is of such a nature as that of the bank in this case. Indeed, I think that the Commission's "possession and control" of the gold bars in the hands of the bank amounted to a form of property more substantial than that which H.M. Government acquired by requisitioning the *Broadmayne*. Yet the *Broadmayne*

⁸⁴ (1875) L.R. 7 H.L. 423, 430.⁸⁵ (1845) 6 Beav. 1, 39.

was held to be exempt from arrest by virtue of His Majesty's immunity.⁸⁶ H. L. (E.)

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The suit began as a claim in *detinue*. That means that the court was going to be asked or at any rate could be asked to make an order upon the bank to hand over the bars to the plaintiffs. Such an order would unquestionably interfere with the Commission's possession of them and compel the Commission, if they wished to recover possession, to come to court and try to get them back from the plaintiffs. I cannot feel any doubt that such a suit offends against the principle of sovereign immunity. But then the plaintiffs through their counsel have said that they are willing, if necessary, to drop their claim in *detinue* and proceed with their action on the basis that it is a claim for conversion only, with the result that they will seek to obtain a judgment for damages against the bank and no more. They say that no principle of immunity can be offended merely by mulcting the bailees in damages. How far this argument goes I am not clear. Every servant who insists on his master's title to property in his physical possession is liable to be sued for damages for conversion by the rightful owner, and there would be no such thing as the immunity of a foreign sovereign from suits "against his "movable property" in this country except suits in *rem* against ships. I have found much more difficulty than the learned judges in the courts below in dealing with this point. They felt it to be an obvious proposition that if the court could not make a direct order upon the bank to hand over the bars (and I agree that it could not) it was impossible that it could have any jurisdiction to award damages for a failure to do that very thing. I do not feel altogether satisfied that this is convincing logic: but when I consider the real nature of a claim for damages for conversion I come to the same conclusion. Subject to the payment of costs and special damages (if there are any) an action for damages for conversion can always be stayed if the defendant offers to hand over the property in dispute. In that sense a suit for damages for conversion is an attempt to use the court's process to interfere with the existing possession of the chattel the title to which is in dispute. If the defendant continues to resist and damages are awarded against him he may keep the chattel and pay the damages; but if he does he becomes entitled, if he is a bailee, to set up the plaintiffs' title to the goods, which he has thus paid for, against his own bailor. In other words the court's judgment in the personal action against him would materially affect the

⁸⁶ [1916] P. 64.

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existing right of his bailor in respect of the possession and disposal of the chattel. The result of a judgment in damages has thus some analogy to a sale by the court of a chattel which is in the possession or under the requisition of a foreign sovereign: if the sale cannot be ordered in the one case because to order it would be to use the court's process against the sovereign, then the judgment cannot be rendered in the other. It is for that reason that I am of opinion that the action must be stayed so far as it seeks to impose liability upon the bank in respect of the 51 gold bars which they still retain.

This reasoning does not apply to the 13 bars which have been disposed of. This is an accidental feature of the case which can only be attributed to the bank's own error. But your Lordships must, I think, take the facts as you find them, and, so far as they are known to us, no reason appears why an action against the bank for damages for conversion of these 13 bars should be regarded as trenching on the sovereign immunity of the governments which the Commission represent. I agree, therefore, that, as to these 13 bars, the action ought to be allowed to proceed.

LORD TUCKER. My Lords, there can be no question but that a foreign sovereign who is cited to appear in the courts of this country either directly, as where he is made a party, or indirectly, as in the case of a writ in rem against a ship where, in the absence of appearance, a judgment in rem good against all the world will result, must take the earliest opportunity to challenge the jurisdiction by entering a conditional appearance and moving to set aside the writ. Where, however, as in the present case, a properly constituted action disclosing a cause of action against a defendant within the jurisdiction is launched, the foreign sovereign cannot be prejudiced by the defendant entering an appearance and defending the action. As soon, however, as it is made to appear to the court that by such action it is being asked to exercise its territorial jurisdiction over property in the possession or under the control of a foreign sovereign the court will decline jurisdiction and stay the proceedings. Before this stage is reached it will often be necessary for discovery to be had and the present case is, in my opinion, one in which discovery was much to be desired. I mention this as the procedure adopted in this case should not, in my opinion, be regarded as a precedent to be followed in future cases of a like nature. Your Lordships, however, having been supplied with a copy of the bank account

and certain further correspondence, are now fully seized of all the materials necessary to a proper decision on the present appeal.

My Lords, I agree that the relationship between the Bank of England and the three governments created by the correspondence and the delivery of the 64 gold bars was that of bailee and bailors, the bailment being for safe custody and immediately determinable at the will of the bailors. I further agree that as regards the 51 bars remaining in the hands of the bank this relationship still exists unaffected by the disposal of the 13 bars which were sold or by any errors by the bank's subordinate officials in the manner in which the remaining bars were dealt with. The case—so far as the 51 bars are concerned—is accordingly restored to the position in which it was when it came before Jenkins J., when it was assumed by both sides that the relationship was that of bailor and bailee. On this basis both Somervell and Cohen L.JJ. would have reached the same conclusion as Jenkins J.

There has, I think, been a tendency in argument on this appeal to approach Lord Atkin's second proposition in *Compania Naviera Vascongado v. The Cristina*,⁸⁷ which was not necessary to the actual decision of that case, as if it was a statutory definition limiting the circumstances in which the courts of this country would refuse jurisdiction in cases where a foreign sovereign is not directly or indirectly impleaded. I think that Lord Atkin's language must be considered and interpreted in the light of previous authorities and of the speeches of the other members of your Lordships' House in *The Cristina*⁸⁸ and of Lord Atkin himself in *Government of the Republic of Spain v. The Arantzazu Mendi*.⁸⁹ The principle being based on the avoidance of the exercise of a jurisdiction which would offend the dignity or impinge on the independence of a foreign sovereign, I cannot think it would be right to place upon the word "possession" as used by Lord Atkin any specially narrow or restricted meaning or to confine it to actual physical possession by the sovereign himself or his servants. The particular subject matter involved in this case could hardly have been placed anywhere else than in a bank save possibly in the vaults of an embassy. Such considerations as this, viewed in the light of the principle underlying the doctrine of immunity, lead me to the conclusion that in this context the word "possession" must include the right to immediate possession of chattels which have been in the actual

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⁸⁷ [1938] A.C. 485, 490.⁸⁹ [1939] A.C. 256, 265.⁸⁸ [1938] A.C. 485.

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physical possession of a foreign sovereign or his servants and are deposited for safe custody with a bailee in this country.

The part of the case which has given me most difficulty, but as to which none of the judges in the courts below appear to have felt any doubt, is that which relates to the precise form of relief for which the plaintiffs are now asking, viz., damages only for detainue or conversion based on the failure to return the bars on demand. The plaintiffs have now abandoned all claim to the return of the specific goods or for an injunction and are content to rely only on the claim for damages. It is said that this relief can be afforded to the plaintiffs without in any way affecting the rights of the three governments to possession of the gold bars, and that the doctrine of immunity was designed for the benefit of foreign sovereigns and not for the protection of persons resident within the jurisdiction who choose to enter into contractual relations with foreign governments. Sharing as I do the disinclination expressed by Lord Maugham in *The Cristina*⁹⁰ and by the Master of the Rolls in the present case⁹¹ to extend the doctrine of immunity beyond the limits already recognized, this is an argument which has seemed to me to require anxious consideration. I have, however, been persuaded to the view that—attractive as this submission is—to accede to it would really be an infringement of the principle of immunity. A defendant who satisfies a judgment in damages representing the value of goods detained or damages for their conversion acquires thereby such title to the goods as was vested in the plaintiff whose judgment has been satisfied. Such a judgment in the present case would accordingly require the bank to do that which would materially alter the rights of the three governments vis-à-vis the bank to the gold bars and enable the bank in its own right to do that which it otherwise could not have done, i.e., to contest its bailor's title. The fact that any such action by the bank in the present case might be highly improbable cannot affect the question of principle involved, and it seems to me that a judgment which would have this effect must be an infringement of the foreign sovereign's right to immediate possession of the bailed chattels and thus amount to a violation of the right to immunity.

As to the 13 gold bars which the bank has sold wholly different considerations apply. It is conceded that the doctrine of immunity would not extend to afford any protection to the purchasers of the bars. The bank, by its own act, has put an

⁹⁰ [1938] A.C. 485, 515-7.

⁹¹ [1950] Ch. 333, 347-8.

end to the bailment which alone afforded the protective umbrella of immunity. No case has therefore been made out for staying the plaintiffs' action in so far as it is confined to a claim for damages for conversion of the 13 bars sold by the bank since the issue of the writ—the bank being content to treat such sale as if it had occurred before action brought and not requiring the plaintiffs to issue a fresh writ.

For the reasons previously stated I would stay all further proceedings with regard to the remaining 51 bars.

My Lords, save that I prefer to base myself on the three governments' right to immediate possession rather than on their control of the bars I find myself in complete agreement with the reasoning of the judgment of Jenkins J.

Appeal allowed.

Solicitors: *Treasury Solicitor; Freshfields; Slaughter & May.*

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AND

MOHIDEEN ABDUL CADER BADURDEEN RESPONDENT.
SAME APPELLANT;

AND

MOHAMED MOHIDEEN ABDUL CADER . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

Ceylon — Citizenship — Registration — Married male Indian and Pakistani residents—Qualifications—Position of wife and minor children—Indian and Pakistani Residents (Citizenship) Act, No. 3 of 1949, ss. 6 (1) (2) (ii), 22.

A married man, permanently settled in Ceylon, who applies under the Indian and Pakistani Residents (Citizenship) Act, 1949, of Ceylon for registration as a citizen of Ceylon can be so registered although his wife, though ordinarily resident in Ceylon at the date

* *Present:* LORD NORMAND, LORD OAKSEY, LORD REID and SIR LIONEL LEACH.

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of his application, has not been so resident for the seven years before January 1, 1946, nor at all times since their marriage, and his minor children have not been ordinarily resident in Ceylon during the whole period of their dependency on him. There is no express provision in the Act that the husband's permanent settlement in Ceylon must have been achieved in company with his wife and children or that the minimum period of uninterrupted residence required for him has any application to his wife and children.

Decree of the Supreme Court of Ceylon (1951) 52 C.N.L.R. 354 affirmed.

APPEALS (Nos. 34 and 35 of 1951) which, though not consolidated, were heard together, from two decrees of the Supreme Court of Ceylon (May 24, 1951), reversing orders of the Commissioner for the Registration of Indian and Pakistani Residents (July 7, 1950), by which the commissioner (now the appellant) refused the applications of the respondents for registration as citizens of Ceylon under the Indian and Pakistani Residents (Citizenship) Act, 1949.

The Act of 1949 provided for the granting to Indian and Pakistani residents in Ceylon of the status of citizens of Ceylon by registration, upon the conditions and in the manner provided by the Act. Section 6 (2) (ii) required the applicant to produce sufficient evidence to satisfy the commissioner "where the "applicant is a male married person . . . that his wife has been "ordinarily resident in Ceylon, and in addition that each minor "child dependent on him was ordinarily resident in Ceylon while "being so dependent."

In appeal No. 34 the applicant's wife had been ordinarily resident with the applicant for a period of one year and eight months before the date of his application (on November 19, 1949), and was so resident at the date of his application, and his minor children, aged 12, 10 and five years respectively, had been ordinarily resident in Ceylon with him since March, 1948, but had been dependent on him since their birth. In appeal No. 35 the period of the wife's ordinary residence in Ceylon was one year and 11 months before her husband's application, dated November 15, 1949, and the period of the minor children's ordinary residence in Ceylon was for the same length of time, but they had been dependent on him since their births on June 13, 1940, December 23, 1942, and February 1, 1947, respectively.

The appellant commissioner held that the requirements of section 6 (2) (ii) were not satisfied unless (a) the wife of an applicant had been resident in Ceylon from the date of her

marriage or from January 1, 1939, whichever was later, and (b) each minor child had been resident from January 1, 1939, or the date of birth, whichever was later.

The issue for determination in this appeal was whether the appellant was right in so holding, or whether Basnayake J. in the Supreme Court was right in holding that the requirements of the section were satisfied if at the date of the application the wife and minor children had a settled abode in Ceylon with the intention of remaining there permanently, and if also the minor children during their period of residence in Ceylon had been dependent on the applicant.

1952. July 15, 16. *Sir Hartley Shawcross Q.C., Gahan Q.C., Anthony Cripps and Biden Ashbrooke* for the appellant in both appeals. The point, which is a short one, but of considerable importance in that it affects a large number of people, is largely one of first impression. It involves the construction of the Indian and Pakistani Residents (Citizenship) Act, 1949, which, it is submitted, was intended to confer the privilege of citizenship, and particularly the franchise, on certain nationals of India and of Pakistan who had emigrated from those countries and who had settled permanently in Ceylon. The facts of the next appeal, No. 35 of 1951, are very similar and the question of construction is exactly the same. The short point is: does the statute require as a condition of the conferment of the privileges of citizenship in the case of an Indian married man that he should show that he has settled permanently in Ceylon in the sense not only that he has resided there over the period specified in the Act, but also that his wife and his minor children have been residing there? In other words, has he to show in effect that he has built his permanent family home in Ceylon? The policy of the Act is to extend the rights of citizenship of Ceylon only to those Indians and Pakistanis who at the material time in 1949, if they were married, had made Ceylon their real permanent home—those who had their wives and children in Ceylon—and not to those who themselves might have been resident in Ceylon for some time for, say, business purposes, but who had not their wives and children living with them there.

It is in section 6 (2) (ii) that the crux of this case really lies, and it in substance turns on the meaning of the words “has been” in the case of the wife, and “was” in the case of a minor child. Literally, no doubt, the words would be satisfied

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if the wife had been at some time previously ordinarily resident in Ceylon, though not so at the time of her husband's application. But that cannot be the purpose of the section. It must mean that the wife has been ordinarily resident in Ceylon whilst the wife of the applicant. That view is supported by the fact that the child must have been ordinarily resident in Ceylon "while" being so dependent." The relevant sections of the Act are sections 2, 3, 4, 6, 21 and 22. [They were read.] Pursuant to section 21 a body of regulations called the Indian and Pakistani Citizenship Regulations were made by the Minister on August 5, 1949, and they prescribed the form of the application. If the construction of the Act contended for by the appellant be not correct the particulars which the applicant is required to give would appear to be quite irrelevant. One matter in the form is the period of ordinary residence of the applicant's wife in Ceylon from January 1, 1939, or from the date of marriage. Why is this information required if all that is needed to qualify the applicant for registration is to show that his wife was ordinarily resident with him at the time of his application?

The true view, it is submitted, is that he has to show that his wife has been ordinarily resident with him as his wife from January 1, 1939, or from the date of her marriage, whichever was later, and that each minor child has been resident from January 1, 1939, or from birth, whichever was later. This is a case of a marriage before January 1, 1939, and the particulars show that both the wife and the minor children have been resident in Ceylon only for 20 months before the date of the application. There is here no dispute as to the meaning of "ordinarily resident." The matter, as stated, is largely one of first impression. The father has to establish a permanent family home in Ceylon. If there is any inconsistency between the regulations and the Act, then the Act would govern, but if they can be reconciled with each other so as to form a consistent scheme or policy, then the regulations may form some guide as to any particular section. The onus is on the applicant to satisfy the commissioner that he qualifies for this important privilege, and in this case he has not discharged that onus. On the materials before him the appellant properly determined that the respondent had not satisfied all the statutory conditions for registration as a citizen of Ceylon.

Pritt Q.C., Dingle Foot, Stephen Chapman and S. Canagarayar for the respondent in each appeal. The general scheme of the Act is that no one can apply for citizenship for himself unless

he fulfils very substantial qualifications. But once he has done that, he may bring his wife and children with him and they do not have to fulfil anything like such substantial qualifications; they are very much less, and the question is: how much less? It was contended for the appellant that "has been ordinarily "resident in Ceylon" has an elaborate meaning, and means: has been ordinarily resident in Ceylon either since seven years before 1946, and ever thereafter has been ordinarily resident there, unless she had got married only last week, in which case last week will do. It is submitted that the only possible interpretation is that if it is proved that the wife is a person who has been at some time ordinarily resident in Ceylon section 6 (2) (ii) is fully satisfied and that is an end of the matter. Those words "has been ordinarily "resident in Ceylon" cannot be built up to anything more than that the wife has been at some time ordinarily resident in Ceylon. If that be right, it helps the argument with regard to a minor child. The requirement about the child has always in the Act—in seven or eight places—been of ordinary residence and dependence at the time of the application. It would not be right to construe these words in the case of a male married person making an application as meaning that he has to say that at every moment at which his child has been dependent on him it has been resident in Ceylon and at every moment that it has been resident in Ceylon it has been dependent on him. The words in respect of the children do not call for such a construction: they mean that the child was at some period of time, and during all that period, both resident and dependent. The only reasonable construction is that put on the words by the Supreme Court of Ceylon.

The contention that the regulations can be used to interpret the Act is a suggested canon of construction which either does not exist or does so only in the most modest possible form, and in any case, applying it to this case, it is not of the slightest assistance to the appellant. [Reference was made to *Reg. v. Baines*¹; *Jacobs v. Hart*,² and *Minister of Health v. The King (on the prosecution of Yaffe)*.³] The words in the regulation, enacted separately, and said to form part of the Act, cannot have a higher status than the words of the Act. In fact, there is nothing in the regulations to alter the view which should be taken of the Act, and nothing in them inconsistent with the construction contended for on behalf of the respondents. The judgment

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of the court below is correct, and section 6 (2) (ii) only requires that the wife of an applicant should at the date of the application have been ordinarily resident in Ceylon and that each minor child dependent on the applicant should have been ordinarily resident in Ceylon while being so dependent.

Sir Hartley Shawcross Q.C. in reply. One is not to be deterred from giving to words their ordinary meaning by the possibilities of illogicalities arising in circumstances which the legislature did not contemplate as practical realities at all. If there are surprising results it is for the legislature to deal with them. The words can be given a consistent and comprehensive meaning if the basic object of the Act is, as it is submitted it is, in the case of a married man, who is not separated from his wife and who has in fact dependent children, to make sure that he is settled in Ceylon in the sense of having his family and matrimonial home well and truly established there. If that is the basic object all the suggested illogicalities really pale into insignificance. The authorities certainly support my view on the regulations: *Institute of Patent Agents v. Lockwood* ⁴; *Ex parte Andrew*; *In re Andrew*.⁵

With regard to the second appeal (No. 35 of 1951), the facts are a little, but not significantly, different, and the principle involved is indistinguishable; the same argument applies to it as to the first appeal.

Pritt Q.C. I agree.

October 6. The judgment of their Lordships was delivered by LORD OAKSEY. The questions raised in the two appeals are identical in point of principle, namely, whether an applicant who is a married man permanently settled in Ceylon can be registered as a citizen although his wife, though ordinarily resident in Ceylon at the date of his application, has not been so resident for the seven years prior to January 1, 1946, nor at all times since their marriage, and his minor children have not been ordinarily resident in Ceylon during the whole period of their dependency on the applicant.

[His Lordship stated the facts of each appeal and continued:] The question depends on the true interpretation of the Act and regulations made thereunder, and in particular on the interpretation of sections 6 (2) (ii) and 22, which are, so far as material, as follows:—

⁴ [1894] A.C. 347, 360.

⁵ (1876) 45 L.J.Bk. 57.

" 6. It shall be a condition for allowing any application for registration under this Act that the applicant shall have—

" (1) first proved that the applicant is an Indian or Pakistani resident and . . .

" (2) in addition . . . produced sufficient evidence . . . to satisfy the Commissioner that the following requirements are fulfilled in the case of the applicant, namely—. . . (ii) where the applicant is a male married person, . . . that his wife has been ordinarily resident in Ceylon, and in addition, that each minor child dependent on him was ordinarily resident in Ceylon while being so dependent."

" 22. In this Act, unless the context otherwise requires—. . . 'Indian or Pakistani resident' means a person—

" (a) whose origin was in any territory which, immediately prior to the passing of the Indian Independence Act, 1947, of the Parliament of the United Kingdom, formed part of British India or any Indian State, and

" (b) who has emigrated therefrom and permanently settled in Ceylon, and includes a descendant of any such person; . . ."

It was contended on behalf of the appellant commissioner before their Lordships' Board, firstly, that having regard to the definition of "Indian and Pakistani resident" in section 22 of the Act and the regulations which require the applicant to state the period of ordinary residence in Ceylon of the applicant's wife and minor children since January 1, 1939, it must be taken to be the general policy of the Act that only applicants who had permanently settled with their families in Ceylon could apply for citizenship. Secondly, that this policy is carried out in section 6 (2) (ii) of the Act by the provision that the wife of a married applicant must have been ordinarily resident in Ceylon and that the minor children must have been ordinarily resident while dependent on the applicant, and therefore that a male married applicant otherwise qualified cannot be registered unless his wife has ordinarily resided in Ceylon from the date of her marriage or since January 1, 1939, whichever is the later date, and unless his minor children have been ordinarily resident in Ceylon since the date of their births during the whole period of their dependency on the applicant.

Their Lordships are unable to accept these contentions. In their opinion the reasons stated in the able judgments of Basnayake J. in the Supreme Court of Ceylon afford the true

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J. C. interpretation of section 6 (2) (ii), which is undoubtedly a
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It is true that the form prescribed by the regulations does require a statement by the applicant of the period of ordinary residence in Ceylon of the applicant's wife and of his dependent children since January 1, 1939, or from the date of the marriage or of birth as the case may be, and that section 21 of the Act provides that every regulation "shall be as valid and effectual as though it were herein enacted." But the mere reference to the date January 1, 1939, in the relative form does not, in their Lordships' opinion, make it necessary or proper to read into section 6 (2) (ii) a provision that the applicant's wife must have been ordinarily resident in Ceylon since that date. For the forms applicable in cases where the residence of dependents at the date of the application only is admitted to be sufficient contain a similar requirement (see section 4 (2) (b) and 4 (3) and forms I.C. and I.E. for example). Their Lordships agree with Basnayake J. in thinking that the date to which section 6 (2) (ii) most naturally refers is the date of the application, and that the past tense used in the words "has been ordinarily resident" is quite appropriate when speaking of residence at a particular date.

In their Lordships' opinion there are other insuperable difficulties in the way of the appellant's construction. If the words "while being so dependent" in section 6 (2) (ii) mean "during the whole period of the child's dependence" it is obvious, and is conceded, that in the case of a child born before January 1, 1939, who had been dependent during the whole period of his life on his father the section might require that the child should have been ordinarily resident in Ceylon for a longer period than its father. Moreover, section 4 of the Act, which provides ((2) (a)) that an applicant may procure the registration of his wife in addition to his own whether or not she herself is possessed of the special residential qualification which the applicant must possess and the registration of any minor children who may be ordinarily resident in Ceylon and dependent on him, and section 4 (3) (a), which provides that the widow of any Indian or Pakistani resident who dies after qualifying for registration may exercise the privilege of applying for registration which her husband could have exercised provided that she has continued to be resident in Ceylon after her husband's death to the date of her application, but regardless of any previous residence, appear to their Lordships to be inconsistent with the construction of the

Act for which the appellant contends. It would, in their Lordships' view, be an extraordinary provision that the husband should have to prove, for the purpose of his own registration, that his wife had been ordinarily resident in Ceylon for a longer period than it was necessary to prove in applying for his wife's registration.

There is no express provision in the Act that the husband's permanent settlement in Ceylon must have been achieved in company with his wife and children or that the minimum period of uninterrupted residence required for the husband has any application to his wife or children.

For these reasons, therefore, and for the reasons so clearly stated by Basnayake J., their Lordships will humbly advise Her Majesty that both these appeals should be dismissed. The appellant must pay the costs of the appeals.

Solicitors: *Burchells; Hy. S. L. Polak & Co.*

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AND		Feb. 20, 21,
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OTHERS	RESPONDENTS.	Apr. 3.

Charity—Royal College of Surgeons—Incorporation by Royal Charter—Objects—Charitable institution—Will—Construction—Gift to hospital for department of medical school—Defeasance to operate if hospital nationalized—Nationalization of hospital but not of medical school—National Health Service Act, 1946 (9 & 10 Geo. 6, c. 81), ss. 6, 7, 8 (2), 11 (8), 151.

A testator, who died in 1943, by her will directed certain moneys to be paid yearly to the treasurer of the Middlesex Hospital for the maintenance of the institute of pathology, which was part of its medical school, but directed that "should the Middlesex Hospital "become nationalized or . . . pass into public ownership" there

* *Present*: LORD NORMAND, LORD MORTON OF HENRYTON, LORD REID, LORD TUCKER and LORD COHEN.

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should be a gift over to the Royal College of Surgeons of England absolutely for its general purposes. By the National Health Service Act, 1946, the hospital was transferred to and vested in the Minister of Health but, under the terms of the Act, the medical school was not nationalized and its assets and liabilities were transferred to a new incorporated body.

Held, (1) (affirming the decision of the Court of Appeal) that the event on the occurrence of which the testatrix had directed that the gift over in favour of the college should take effect had taken place, despite the fact that part of the property of the hospital as it existed previously had been exempted from nationalization; (2) (*per* Lord Normand, Lord Morton of Henryton, Lord Reid and Lord Tucker, Lord Cohen dissenting, and reversing the decision of the Court of Appeal) that the college was in law a charity, its object, though set out in the recitals to its charter only as the reason for establishing it, being "the due promotion and encouragement of "the study and practice" of the art and science of surgery, and the professional protection of its members provided for in its by-laws being merely ancillary to that object; (3) that the fact that the charity designated to take under the gift over is a body incorporated by royal charter does not exclude the operation of the rule laid down in *Christ's Hospital v. Grainger* (1849) 1 Mac. & G. 460.

In re Royal College of Surgeons of England [1899] 1 Q.B. 871 considered.

Decision of the Court of Appeal (sub nom. *In re Bland-Sutton National Provincial Bank Ltd. v. Middlesex Hospital*) [1951] Ch. 485 affirmed in part and reversed in part.

APPEAL from the Court of Appeal (Evershed M.R., Jenkins and Hodson L.JJ.).

This was an appeal from an order of the Court of Appeal dated February, 1951, whereby the court discharged an order of Danckwerts J. dated July 7, 1950, and declared that on the true construction of the will of Lady Edith Goff Bland-Sutton certain provisions therein contained in favour of the Royal College of Surgeons were void for remoteness. One of the questions at issue was whether the college was a charity and entitled accordingly to take under the disposition contained in the provisions notwithstanding that it was expressed to take effect on the happening of events not restricted to the perpetuity period.

By her will dated January 13, 1943, the testatrix appointed the National Provincial Bank Ltd. to be the executor and trustee thereof, and after certain specific and pecuniary legacies and bequests of annuities gave, by clause 10, the residue of her real and personal estate to the bank on trusts for sale and

conversion and to stand possessed of the net proceeds of the investments representing the same (hereinafter referred to as "the endowment fund") "upon the following charitable trusts "for so long as the law shall permit": (1) to provide out of the income for a research scholarship, and "(2) to pay the residue "of the income of the endowment fund in each year to the "treasurer or other proper officer of the Middlesex Hospital for "the maintenance and benefit of the Bland-Sutton Institute of "Pathology now carried on in connexion with the said hospital."

By clause 11 she provided that if the institute ceased to be carried on as a pathological research institution, or if its name should be changed, or "should the Middlesex Hospital become "nationalized or . . . pass into public ownership," or if the bank should at any time become unable lawfully to apply the income for the "purposes aforesaid, then and in any of the said events "the bank shall thereupon pay and transfer the endowment fund "(both as to the capital and the income thereof) to the Royal "College of Surgeons absolutely for the general purposes of the "said college." The testatrix died on February 10, 1943.

On July 5, 1948, the provisions of the National Health Service Act, 1946, came into operation, and in consequence (a) the hospital being a teaching hospital, there was a severance between the functions of the hospital properly so called and those of its medical school; (b) the medical school and so much of the buildings as had previously housed all the activities of the hospital appropriated to the school became vested in the council of the Middlesex Hospital Medical School, a new corporation created pursuant to the Act and independent of the Minister of Health; (c) the hospital, as such, with all its property and liabilities (other than its endowments) became vested in the Minister of Health; and (d) its endowments, as defined by the Act, became vested in a new board of governors established pursuant to the Act and wholly under the control of the Minister of Health.

On August 24, 1948, the bank began proceedings by originating summons to determine whether the provisions of clause 11 of the will were valid or void on the grounds of uncertainty, perpetuity or otherwise, and whether, if they were valid, any of the events mentioned in clause 11 had happened.

The Royal College of Surgeons was incorporated by royal charter on March 22, 1800. The charter contained the following, among other, recitals: "And whereas it is of great consequence "to the commonweal of this kingdom that the art and science "of surgery should be duly promoted; and whereas it appears to

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“us that the establishment of a college of surgeons will be
“expedient for the due promotion and encouragement of the
“study and practice of the said art and science.” Further
charters were granted from time to time.

The origins of the college, the provisions of its charters, and
the other facts relevant to the decision are fully set out in the
opinion of Lord Morton of Henryton.

Cross Q.C. and *L. J. M. Smith* for the appellant, the Royal
College of Surgeons. The rule against perpetuities has no
application to a gift over from one charity to another: *Christ's
Hospital v. Grainger*.¹ There is no objection in law to a gift
over from one charity to another charity at however remote a
period, though the law will not allow a gift over from a private
individual or a charity to another private individual at a remote
date. This applies equally to a charitable corporation. If a
corporation is established for charitable purposes the court can
intervene in its conduct at the instance of the Attorney-General.

On the question whether the college is a charity, this is
primarily a matter of the construction of its charter, although
its activities can also be considered: *Battersea Borough Council
v. British Iron and Steel Research Association*.² Thus, if the
charter leaves it in doubt whether the object of the college is the
promotion of surgery or to confer benefits on its members, it is
relevant to consider what it has actually done.

If the purposes for which a body is constituted are charitable
the court will always regard it as holding its property on
charitable trusts which the court can superintend and administer.
The charters here, on their true construction, amount to a trust
for the promotion of surgery and show that the college has one
principal object only, the encouragement of the study and
practice of the art and science of surgery. Alternatively, if it
has two main objects, these are the promotion of (a) the study
and (b) the practice of the art and science of surgery; its object
is not the promotion of the practices of the individual members.
The fact that benefits may accrue to the members does not
prevent an institution from being charitable if those benefits are
only ancillary to the main object. It is almost impossible to
promote an art like surgery without assisting good practitioners
and discouraging bad ones. The college is like a medical univer-
sity, and such a body (a) promotes medical research in research

¹ (1849) 1 Mac. & G. 460.

² [1949] 1 K.B. 434, 451-2.

institutions and laboratories, and (b) trains students for the medical profession and on their passing examinations gives them diplomas or licences which may assist them in their profession. The college is not parallel to a trade protection society, and it is also to be contrasted with such a body as the Law Society, which is much concerned with scales of costs and the exclusion of unauthorized persons from practice, largely promoting the business interests of its members. By contrast the activities of the college in the "trade protection" field are negligible, and membership does not confer any privileges in the profession of surgery. Its prime object is to improve the quality of surgery, and that is charitable, although the result may be also to increase the remuneration of the surgeons.

*In re Royal College of Surgeons of England*³ does not involve the conclusion that the college has two main purposes, of which the promotion of the professional interests of surgeons was one or an essential part of one. That case turned on the question whether it promoted science, and it was held that all its activities were not scientific: see *per Romer L.J.*⁴ If that case be treated as holding that not all of its activities tended to the promotion of science, the decision is not questioned. But that does not conclude the question whether or not the trust is charitable. Accordingly, that case is distinguishable from the present one. Otherwise it is wrong or, at any rate, the new evidence now available is sufficient to justify a different conclusion. In that view it is inconsistent with *Inland Revenue Commissioners v. Forrest*⁵ and *Institution of Civil Engineers v. Inland Revenue Commissioners*.⁶ It would be surprising if the institution were a charity and the college were not. In the case of each, membership is confined to members of the profession in question. In each case by passing certain examinations a member obtains the right to put certain initials after his name. In each case the body exercises some disciplinary control over its members. In neither case has the institution any control over the profession at large. In each case the institution is concerned with the higher education of members of the profession by means of lectures, research work and publications. The only difference is that the passing of the examination of the Institute of Civil Engineers has no direct bearing on the qualification to practice, though doubtless it is a professional help.

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³ [1899] 1 Q.B. 871.⁴ *Ibid.* 880 et seq.⁵ (1890) 15 App.Cas. 334.⁶ [1932] 1 K.B. 149.

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The fact that incidentally a body may promote non-charitable objects does not prevent it from being charitable. The question depends on the object which the institution was established to achieve and not on the consequences of its establishment. The question of law to be decided is whether the professional activities of the college constitute a collateral purpose or are subsidiary to its main object which is to further the study and improve the quality of surgery in England, though this improvement may incidentally improve the social and financial position of surgeons. The object of any particular member in joining the college is irrelevant unless the object of the body is to improve the position of surgeons. It is a charitable purpose to educate the members of a particular profession up to a certain standard, for education is not confined, so far as charity is concerned, to general liberal education; it extends to professional education also. The object of the college is within the scope and intendment of the statute 43 Eliz. 1, c. 4, and accordingly it is a charity.

The only objects of the college are clearly set out in the recitals to the charter of 1800 and also of the charters of 1822 and 1843, and these objects are charitable. The recitals govern the whole of the operative part of the charters. There is nothing in the charters about promoting the professional interests of the members but it is not outside their scope if the college does what it can to protect its members so far as the certificates which it gives do so. The company which was the predecessor of the college was dissolved, and accordingly the college is not a trade guild. The power given to its governing body to transact such matters as the governing body of the dissolved company might transact is purely administrative. The disciplinary powers contained in the by-laws of the college do not render not charitable an institution which is otherwise charitable. In any event, discipline is in practice maintained by the General Medical Council. The powers of the college to defend its members are retained in the interests of the public so that surgeons, feeling that they have that support, may fearlessly render their best services to their patients.

*Miley v. Attorney-General for Ireland*⁷ depended on the particular charter in that case. In *Society of Writers to Her Majesty's Signet*⁸ and *Sulley v. Royal College of Surgeons, Edinburgh*,⁹ the ground of the decisions was that the main object

⁷ [1918] 1 I.R. 455.⁸ (1886) 14 R. 34.⁹ 1892, 29 S.L.R. 620; 3 Tax Cas. 173.

of the respective institutions was the professional advantage of the members. The latter case can be distinguished from the present, and neither it nor the Irish case need be disapproved if one looks at the particular issues which had to be decided. [They also referred to *In re Lopes*¹⁰ and *Smith v. Kerr*.¹¹]

Since the Middlesex Hospital has been nationalized within the meaning of clause 11 of the will, the gift over in favour of the college, which is a charity, is valid and effective.

S. Pascoe Hayward Q.C. and *Goff* for the respondent Council of the Middlesex Hospital Medical School. The gift over in clause 11 of the will can take effect after the lapse of any period of time, and is accordingly void as infringing the rule against perpetuities unless it comes within the exception to the rule by virtue of the fact that, after it takes effect, the endowment fund will continue to be held on charitable trusts for charitable purposes only. Accordingly the questions to be decided are: (a) Does the exception to the rule against perpetuities apply at all to a gift over to a body incorporated by royal charter? (The answer must depend on the nature and extent of the exception.) (b) Assuming that the exception applies, has the college charitable objects so as to bring the gift over within the exception? (The answer turns entirely on the true construction of the charter.)

As to the exception, three points are established: (a) The exception applies only in a case where both before and after the gift over taking effect the property in question is inalienable because it is held on trust. The exception was first laid down in *Christ's Hospital v. Grainger*¹²; see also *Gray on Perpetuities*, 5th ed., p. 572. In *In re Tyler*¹³ the trusts in the charter in that case may have prevented this argument from being put forward. (b) In the case of any corporation at all the corporate property is not held on trust. The fact that its constitution provides objects expressly or by necessary implication does not create a trust in favour of those objects: see *Bowman v. Secular Society Ltd.*,¹⁴ per Lord Parker. (c) This is particularly so in the case of bodies incorporated by royal charter because they enjoy a greater measure of freedom in dealing with their property than statutory corporations: see *Attorney-General v. The Haberdashers' Company*¹⁵ and *Baroness Wenlock v. River Dee Co.*¹⁶

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¹⁰ [1931] 2 Ch. 130.¹¹ [1902] 1 Ch. 774.¹² 1 Mac. & G. 460.¹³ [1891] 3 Ch. 252.¹⁴ [1917] A.C. 406, 440.¹⁵ (1834) 1 My. & K. 420.¹⁶ (1883) 36 Ch.D. 675n., 685n.

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A corporation has all the powers of an individual. If it disregards some limitation in its charter it is not acting ultra vires. If it does so it cannot be restrained by injunction. The only risk is that the charter might be rescinded on an application by the Attorney-General by writ of scire facias. A gift over to such a corporation does not fulfil the condition that the property should be neither more nor less alienable than before. The language used in *Christ's Hospital v. Grainger*¹⁷ is wider than was necessary for the decision of that case, and has wrongly been considered to apply to all cases of a gift over from one charity to another. [They also referred to *Royal Choral Society v. Inland Revenue Commissioners*¹⁸; *Riche v. Ashbury Railway Carriage and Iron Co. Ltd.*¹⁹; *Bonanza Creek Gold Mining Co. Ltd. v. R.*²⁰; and *Jenkin v. Pharmaceutical Society of Great Britain*.²¹]

The college is not a charity because when the charter is fairly construed it is plain that it has non-charitable professional objects which are in no way subsidiary to any charitable objects. It is free to use its funds for either. There are five points characteristic of a professional body. (a) It has power to admit new members, to allow or disallow applications for membership, to accept or reject them at its discretion. (b) Admission will not be granted to any person save one whom the body considers qualified to practise the particular profession. (c) A person after admission, is able to put himself forward to the public as one whom the body considers qualified, and accordingly he is able to obtain work more easily and charge higher fees than an unqualified person. (d) It exercises disciplinary powers over its members in the exercise of their profession, checking what it considers unprofessional conduct, such as touting, advertising, or stealing customers from other members; it has power to make by-laws. (e) Generally, it has power to advance the interests of the profession as a whole. In the case of a body with objects of this character it will be non-charitable unless on the true construction of its powers they are found to be given as merely ancillary for carrying out some wider charitable object. That is purely a matter of construction. On the true construction of the charter in the present case, the professional objects are not made subsidiary to any charitable objects, and the college is not exclusively charitable. This is also clear from the by-laws which

¹⁷ 1 Mac. & G. 460.¹⁸ (1943) 112 L.J.K.B. 648, 655;²⁵ Tax Cas. 263, 277-8.¹⁹ (1874) L.R. 9 Ex. 224, 262.²⁰ [1916] 1 A.C. 566, 583.²¹ [1921] 1 Ch. 392, 398.

have been used to further the professional interests of the members. H. L. (E.)

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The draftsman was anxious to maintain the continuity between the old company and the new college established when the company was dissolved. The governing body of the new college were given power to transact such matters as the governing body of the old company might lawfully do, and accordingly the college had powers co-extensive with those of the company which is not suggested to have been a charity.

The right place to look for the objects of a corporate body is the operative part of the charter and not the recitals. In this charter there is in the operative part no reference back to the recitals. The last recital, which is relied on by the college, states only the reason for establishing it; it does not state what are the objects of the college when established. The preceding recital is merely a statement of a platitude. Those recitals are not the key sentences in the document. Under the charter it is competent for the college to make by-laws for the protection of its members in the exercise of their profession. The crucial point is not what by-laws have in fact been made but what by-laws could be made. The recitals relied on do not state the only objects of the college and do not control or govern the operative parts of the charter, which are completely independent; they only state the hope and wish of the Crown in bringing it to birth. Further, the recital refers to "practice" which can and, in this document, does mean professional activity. In every case except *Institution of Civil Engineers v. Inland Revenue Commissioners*²² the court has held that a professional body was not a charity. Reliance is placed on *Miley v. Attorney-General for Ireland*.²³ See also *Sulley v. Royal College of Surgeons, Edinburgh*.²⁴

On the true construction of the will the testatrix intended, in the words referring to the hospital becoming nationalized or passing into public ownership, that the gift over should take effect only if all the property for the time being owned by the legal entity known as "the Middlesex Hospital" should be transferred into public ownership. If any part of that property was exempted the institution nationalized was not "the Middlesex Hospital" within the meaning of clause 11. No such transfer of all the property was effected by the Act of 1946. Further, if, on the true construction of the will, the testatrix intended that the gift

²² [1932] 1 K.B. 149.

²³ [1918] 1 I.R. 455, 459.

²⁴ 1892, 29 S.L.R. 620; 3 Tax Cas. 173.

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over should take effect on the imposition of any measure of governmental or public control of the hospital, or otherwise than on the occurrence of such a transfer of property, then the gift over was void for uncertainty.

Nigel Warren for the National Provincial Bank Ltd. The position of the bank is neutral and it has no argument to submit to the House.

[LORD NORMAND intimated that their Lordships did not require to hear further argument on the defeasance point but wished to hear the appellant's submissions in reply on the question whether the objects of the college were charitable and also on the point as to the ambit of the rule in *Christ's Hospital v. Grainger*.²⁵]

Cross Q.C. in reply. The latter is a novel point never put forward before. In *In re Tyler*²⁶ the gift over was to a corporation, the Blue Coat School. If a body is established for charitable purposes it must follow that the Attorney-General can control its expenditure: see Halsbury's Laws of England, 2nd ed., Vol. IV, p. 336, para. 566.

As to the former point, the fact that a body possesses all the five characteristics enumerated on behalf of the respondents as marking a professional body does not necessarily prevent it from being charitable. Innumerable bodies undoubtedly charitable possess these characteristics. The power to discipline its members is not inconsistent with a body being charitable. The by-laws in advancing the interests of the members do not go beyond charitable objects. All the charters and the Medical Act, 1858, must be read together. The recitals represent the important point. In the charters themselves there is no reference to professional purposes. A society for improving the art and science of plumbing would be charitable but a trade union of plumbers would not.

Their Lordships took time for consideration.

April 3. LORD NORMAND. My Lords, I have had the advantage of reading the opinion about to be delivered by my noble and learned friend, Lord Morton of Henryton, and I agree with it. I propose, therefore, only to discuss the single question upon which there is a difference of opinion among your Lordships who heard the appeal, the question whether the Royal College is in

²⁵ 1 Mac. & G. 460.

²⁶ [1891] 3 Ch. 252.

law a charity. The question as it is now presented was not, as it has been explained by my noble and learned friend, Lord Morton of Henryton, before the Court of Appeal when it decided that the Royal College was not entitled to exemption from the duty imposed by section 11 of the Customs and Inland Revenue Act, 1885: *In re Royal College of Surgeons of England*.²⁷

The decision in this case depends primarily on the construction of the constituent documents of the college, and particularly the charter granted by King George III in 1800, for it is to these documents that we naturally look in order to discover what are the objects for which the college was instituted. The peculiarity of the charter of 1800 is that the objects are nowhere set out or described *eo nomine*. The operative part of this document confers powers and imposes duties and provides for the appointment of officers of the college and generally for the carrying on of the college as a body independent of the Corporation of the City of London. But it nowhere states, or even refers to, the objects which the college exists to fulfil. In one of the recitals, however, it is said: "It appears to us that the establishment of a College "of Surgeons will be expedient for the due promotion and "encouragement of the study and practice of the said art and "science" of surgery. These words give the reasons moving the Crown to grant the charter, and, if there were elsewhere in the document a statement of the objects of the college incorporated by the charter, it would prevail over the recital. But, in the absence of any other clarification of the objects, the Crown's motive for making the grant may legitimately be regarded as coinciding with the objects of the college which the charter incorporated. That appears at least to be a more satisfactory way of arriving at a definition of the objects than by attempting to infer the objects from the powers, duties and machinery created to enable the college to carry them out. I am, therefore, prepared to hold that the objects are to be found in the recital which I have quoted.

If that be so, the next step is to construe that recital. The words "the study and practice of the art and science" of surgery do not, in my opinion, mean "the academic study and professional practice of the art and science of surgery"; they signify rather the acquisition of knowledge and skill in surgery both by abstract study and by the exercise of the art in the dissecting room

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²⁷ [1899] 1 Q.B. 871.

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and the anatomy theatre, and they are capable of covering both the discovery of new knowledge, which is the fruit of research, and the learning of existing knowledge either by students who are qualifying or by qualified surgeons desirous of improving their knowledge and skill. On that construction the professed objects of the college all fall into the categories of the advancement of science or of the advancement of education, and are charitable.

Nothing in the later part of the charter or the later charters induces me to modify that construction. A clause is inserted to exclude the jurisdiction of the Corporation of the City of London. The reason for that is that the Corporation of Surgeons which had been created by Act of Parliament in the reign of George II, and which had been dissolved for some time before 1800, was a trade guild subject to the civic jurisdiction, and in 1800 it was intended that the new college should have an independent and a higher status. If the present royal college were a successor of a trade guild carrying on the objects of such a guild, I doubt whether it could make good its claim to be a charity. But the clauses of the charter are not so conceived as to reconstitute the dissolved trade guild. They leave no doubt that a new and different body was being established, though there are provisions vesting in the new body the gifts, grants, liberties, privileges, immunities and possessions of the old body and giving its officers the same powers to transact business as were possessed by the officers of the old body. All of these provisions are, I think, to be interpreted as machinery provisions subserving the ends or objects of the new college as defined by the recital.

There is also a power to make by-laws for the regulation, government and advantage of the college. It was said that this power had been used in order to further the professional interests of the members of the college. I shall assume that such a use, even if it were a misuse of the power, would be evidence upon which it would be proper to hold that the college was not, or was no longer, a charity. By by-law XV the council of the college undertakes at all times to "protect and defend every fellow, "fellow in dental surgery, member and licentiate in dental "surgery of the college in the exercise and enjoyment of the "rights and privileges acquired by him as a diplomate of the "college." By-law XVI gives the college power to discipline members adjudged guilty of professional misconduct or convicted of a crime. In my opinion, these by-laws are in the strictest sense by-laws for the regulation, government and advantage of

the college. The professional advantage which might accrue to individuals from the protection promised them in the exercise and enjoyment of the rights and privileges acquired by them as diplomates of the college is but the inevitable and incidental result of a provision intended to secure the dignity and honour of the college to which they owe their diploma. So, also, the disciplinary power is a power necessary for the success and good name of the college, and only incidentally advantageous to the individual diplomates. To hold that these by-laws negative the claim of the college to be a charitable institution would be inconsistent with the decision in *Institution of Civil Engineers v. Inland Revenue Commissioners*,²⁸ for the rights and privileges of members of the institution and its powers of discipline over them seem to me to be entirely comparable to the corresponding rights, privileges and powers in this case.

I therefore concur with my noble and learned friend in the motions which he will propose.

LORD MORTON OF HENRYTON. My Lords, the appellant, the Royal College of Surgeons of England (hereafter referred to as "the college") claims that on July 5, 1948, it became absolutely entitled to the "endowment fund" created by the will of the testatrix, Lady Bland-Sutton. This claim is resisted by the second respondent, hereafter referred to as "the medical school."

The testatrix made her will on January 13, 1943, and died on February 10, 1943. The only relevant clauses of her will are clauses 2, 10 and 11. By clause 2 the testatrix appointed National Provincial Bank Ltd. (the first respondent to this appeal) to be the executor and trustee of her will. By clause 10 the testatrix gave all the residue of her real and personal estate to the bank upon the usual trusts for sale and conversion and directed the bank to hold the net proceeds of such sale and conversion and the investments for the time being representing the same (which she called "the endowment fund") "upon the following "charitable trusts for so long as the law shall permit." By sub-clause (1) of clause 10 the testatrix directed the bank to pay the annual sum therein mentioned to the college for the purpose of maintaining a Bland-Sutton Research Scholarship in the Bernard Baron Laboratories at the college upon the terms and conditions therein mentioned. By sub-clause (2) she directed the bank "to "pay the residue of the income of the endowment fund in each

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“ year to the treasurer or other proper officer of the Middlesex
“ Hospital for the maintenance and benefit of the Bland-Sutton
“ Institute of Pathology now carried on in connexion with the said
“ hospital.”

Clause 11 of the will is as follows: “ Provided always that
“ should the said Bland-Sutton Institute of Pathology cease to
“ be carried on as a pathological research institution or should its
“ name be changed or should the Middlesex Hospital become
“ nationalized or by any means pass into public ownership or
“ should the bank at any time become unable lawfully to apply
“ the income of the endowment fund for the purposes aforesaid
“ then and in any of the said events the bank shall thereupon
“ pay and transfer the endowment fund (both as to the capital
“ and the income thereof) to the said Royal College of Surgeons
“ absolutely for the general purposes of the said college and the
“ receipt of the treasurer or other proper officer thereof shall be
“ a full and sufficient discharge to the bank therefor.”

It will at once be apparent that one or other of the events specified in clause 11 of the will might happen at any time in the future, however remote. Accordingly, the gift over to the college is void as offending the rule against perpetuities unless the college can establish that it is a charity and comes within the exception to that rule which was established by the well-known case of *Christ's Hospital v. Grainger*.²⁹ Down to July 5, 1948, the “ appointed day ” under the National Health Service Act, 1946, no difficulty arose as to the effect of the will, but doubts then arose as to the effect of the provisions of that Act on the trusts declared by the will, and the bank took out an originating summons to have the matters of doubt determined.

The case came first before Danckwerts J. He held that the college was a charity and that, for this reason, the gift over to the college was not rendered invalid by the rule against perpetuities. He held, however, that no one of the events mentioned in clause 11 of the will had so far occurred.

The Court of Appeal differed from Danckwerts J. on each of these points. All the members of that court were of opinion that the Middlesex Hospital had been nationalized, within the meaning of clause 11 of the will. They then considered the question whether the gift over to the college was valid, notwithstanding the rule against perpetuities, on the ground that the college is a charity. The Master of the Rolls expressed himself as follows³⁰:

²⁹ 1 Mac. & G. 460.

³⁰ [1951] Ch. 485, 498.

" Sympathizing, as I am strongly inclined to do, with Danckwerts J.'s opinion of the nature of the purposes of the college, " I am unable to escape the conclusion that, in conformity with " the principles recently expounded in *Young v. Bristol Aeroplane Co. Ltd.*,³¹ the court is bound by the decision of the Court of " Appeal in *In re Royal College of Surgeons of England*³² to " conclude that the college fail to qualify as a charity." Jenkins L.J. said³³: " Having regard to the decision of this court in *In re " Royal College of Surgeons of England*³⁴ as to the nature of the " college's objects, I do not think it was open to Danckwerts J., " or is now open to this court, to deal with the matter in that " way." And Hodson L.J. was of opinion³⁵ that " the court " ought to consider itself bound in the circumstances of this case " by the opinion expressed by the court in *In re Royal College " of Surgeons of England*.³⁶ It will be convenient to refer to the case by which the members of the Court of Appeal considered themselves bound as " the 1899 case."

The result was that the Court of Appeal held the gift over to be void for remoteness, as that court felt bound to hold that the college was not a charity. It was conceded that on this footing the gift of income contained in clause 10 (2) of the will would continue on foot as a gift of income for charitable purposes for an indefinite period, in accordance with the principle laid down in *Hancock v. Watson*.³⁷ The college now appeals, and submits that the Middlesex Hospital was nationalized on July 5, 1948, within the meaning of clause 11 of the will; that the college is a charity; and that the gift over in favour of the college is therefore valid and effective.

My Lords, I propose first to consider whether the Middlesex Hospital has become nationalized, within the meaning of clause 11 of the will. It is not now suggested that any one of the other events mentioned in that clause has occurred. The relevant facts in regard to the Middlesex Hospital, the medical school and the Bland-Sutton Institute of Pathology referred to in the testatrix's will have been so admirably summarized by Jenkins L.J. that I shall take the liberty of quoting the portion of his judgment which deals with these matters: " The Middlesex Hospital was incorporated by Act of Parliament in 1836, but had then already " been in existence for more than 90 years. Teaching in the

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³¹ [1944] K.B. 718.³² [1899] 1 K.B. 871.³³ [1951] Ch. 485, 512.³⁴ [1899] 1 K.B. 871.³⁵ [1951] Ch. 485, 520.³⁶ [1899] 1 K.B. 871.³⁷ [1902] A.C. 14.

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“wards of the hospital had begun in 1745, but the medical school associated with it was not founded until 1835. Down to 1896 the school, though associated with, did not form part of, the hospital. In that year it became part of the hospital under a scheme of amalgamation which was adopted by the weekly Board of Governors of the hospital on July 28, 1896. Under this scheme the hospital took over the property and liabilities of the school, and the school became, and thereafter down to July 5, 1948 (being the appointed day under the National Health Service Act, 1946), remained a department of the hospital, though in practice it enjoyed a considerable degree of autonomy in the management of its affairs (through a council constituted for the purpose under the scheme), and its accounts were kept separate from those of the hospital. In 1900 on the reconstitution of the University of London the school became a school of the university. This did not affect the legal position of the school as a department of the hospital, but involved recognition of the school by the university as one where London University medical students might take their training, and the university became the examining body of the school to which it also made grants. The Bland-Sutton Institute of Pathology referred to in the testatrix’s will was opened in 1914 as part of the school in a building for which a sum of money had been provided by Sir John Bland-Sutton in 1913. The school has always been housed on the same site as the hospital, and the buildings devoted to the purposes of the school (including the Institute building) are physically connected and one might say intermixed with those of the hospital as distinct from the school.” The learned Lord Justice went on to set out the relevant provisions of the National Health Service Act, 1946, in order to show what was the effect of that Act on the hospital and the medical school. I am relieved from the necessity of embarking on this task because it is now common ground that the hospital, divested of the assets and liabilities of the school, was “nationalized” on July 5, 1948, while the medical school, which was an important department of the hospital down to July 5, 1948, has not been nationalized.

In these circumstances, has the event happened which the testatrix expressed in the words “should the Middlesex Hospital become nationalized”? I would answer this question in the affirmative, and I can state my reasons very shortly, as I am in agreement with the reasoning and the conclusion of the Court of Appeal. I think the test to be applied is: has the institution

to which the testatrix referred as "the Middlesex Hospital" ceased to exist? If it is still in existence, there is no doubt that it has been nationalized.

The argument of counsel for the second respondent involves the proposition that if any part of the property of the hospital, as it existed prior to the appointed day, were exempted from the process of nationalization, the institution which became nationalized on the appointed day would not be "the Middlesex Hospital" within the meaning of clause 11 of the will. In my view, this contention gives a very artificial meaning to clause 11 and I cannot accept it. Moreover, I agree with the Court of Appeal that there are indications in the will which support the view taken by that court. Each member of the court relied on these indications, and the matter is dealt with most fully by Jenkins L.J., who said³⁸: "Apart from the natural meaning of the testatrix's reference to 'the Middlesex Hospital' there are indications in clauses 10 (2) and 11, which seem to me on the whole to support the conclusion to which I have come. She refers, in clause 10 (2), to 'the Bland-Sutton Institute of Pathology now carried on in 'connexion with' the Middlesex Hospital. That form of words seems to me to suggest that she regarded the institute as connected with but distinct from the hospital itself; and I think the word 'now' in the phrase 'now carried on' also holds a suggestion that the institution referred to as 'the Middlesex Hospital' had existed and might continue to exist as such without the Bland-Sutton Institute—and inferentially without the school of which the institute formed part. Further, clause 11 contains no reference to the nationalization of the institute. The relevant event contemplated is the nationalization of the hospital. If the testatrix's concept of nationalization of the hospital had been such as Danckwerts J. has held it to be, it would surely have been more natural for her to refer to nationalization of the institute itself. As it is, the language she has used seems to contemplate the possibility of the hospital becoming nationalized in the sense in which she uses that expression without nationalization of the institute 'carried on 'in connexion' with it, or inferentially of the school of which the institute formed part."

The result is that the gift over in clause 11 of the will has taken effect in favour of the college, unless that gift over is rendered invalid by the rule against perpetuities. Mr. Cross for

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³⁸ [1951] Ch. 485, 509.

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the college contends that his client is a charity, in the legal sense of the word, and that the rule against perpetuities has no application to a gift over from one charity to another. In support of the latter proposition he relies on the case of *Christ's Hospital v. Grainger*.³⁹ Mr. Pascoe Hayward for the medical school contends first that the college is not a charity, and secondly that, even if the college is a charity, the rule in *Christ's Hospital v. Grainger*³⁹ does not apply to a case where the charity designated to take under the gift over is a body incorporated by royal charter.

My Lords, it will, I think, be convenient to deal with this latter submission before coming to the only question which was argued at any length in your Lordships' House, viz., is the college a charity? The submission is a novel one, for the industry of counsel could not discover any case in which it had been put forward in the 103 years which have elapsed since the decision in *Christ's Hospital v. Grainger*.³⁹ In that case the Corporation of London, as governors of Christ's Hospital, claimed certain property which had been left by the testator, John Hendricke, in 1624, to the Corporation of Reading, for certain charitable purposes in that town, with a direction that if the donees should for a year neglect, omit, or fail to perform the directions of his will, such gift should be utterly void, and should forthwith be paid and transferred to the Corporation of London for the benefit of Christ's Hospital. The strict execution of the directions of the will having been found inconvenient, an information was filed by the Attorney-General in the Court of Exchequer against the Corporations of London and Reading, which led to a decree in 1639, varying the purposes and application of the charity, but still confined to Reading, and providing, as in the will, that if the Corporation of Reading should neglect to perform the directions of the decree, or should misemploy the trust property, and such neglect and misemployment should continue for a year, the legacy should be void and of no effect as to Reading, and that the property should be forthwith paid and transferred to the Corporation of London, for the benefit of Christ's Hospital.

It was clearly established that the directions of the decree, as well as those of the will, had been neglected for the period of far more than one year. It was argued that the gift over was void, as contrary to the rule against perpetuities, but Lord Cottenham L.C. rejected this argument, saying⁴⁰: "If the Corporation of Reading might hold the property for certain charities in Reading,

³⁹ 1 Mac. & G. 460.⁴⁰ Ibid. 464.

“ why may not the Corporation of London hold it for the charity
 “ of Christ’s Hospital in London? ” Certain portions of the
 reasoning of the Lord Chancellor in that case may be open to
 criticism, but his decision has always been treated as good law.

In *In re Tyler*⁴¹ the testator had made a bequest in the
 following terms: “ I give to the trustees for the time being of
 “ the London Missionary Society the sum of £42,000 Russian
 “ 5 per Cent. Stock, with a rentcharge to my brother, Charles
 “ Tyler, Esq., of £1,000 a year for life. Also I commit to their
 “ keeping of the keys of my family vault at Highgate Cemetery,
 “ to the (sic) care and charge, my brothers to be buried in the
 “ vault if they wish, and to use the same, if they wish, for any
 “ member of the family, the same to be kept in good repair and
 “ name legible, and to rebuild when it shall require: failing to
 “ comply with this request, the money left to go to the Blue Coat
 “ School, Newgate Street, London.” Stirling J. said⁴²: “ The
 “ rule against perpetuities has no application to a transfer in a
 “ certain event from one charity to another, as is expressly laid
 “ down by Lord Cottenham in the case of *Christ’s Hospital v.*
 “ *Grainger*⁴³ ”; and held that the condition and gift over were
 good. An appeal from his decision was dismissed, and Lindley
 L.J. said⁴⁴: “ What is this gift when you come to look at it?
 “ It is a gift of £42,000 Russian 5 per Cent. Stock to the London
 “ Missionary Society. What for? It is for their charitable
 “ purposes. It is a gift to them for the purposes for which they
 “ exist. Then there is a gift over to another charity in a given
 “ event—that is to say, the non-repair of the testator’s vault.
 “ It seems to me to fall precisely within the principle on which
 “ *Christ’s Hospital v. Grainger*⁴⁵ was decided. A gift to a charity
 “ for charitable purposes, with a gift over on an event which may
 “ be beyond the ordinary limit of perpetuities to another charity
 “ —I cannot see that there is anything illegal in this.” Fry L.J.
 said⁴⁶: “ Inasmuch as both the donees of this fund, the first
 “ donee and the second, are charitable bodies, and are created for
 “ the purposes of charity, the rule of law against perpetuities has
 “ nothing whatever to do with the donees ”; while Lopes L.J.
 concurred.

My Lords, there is not the slightest indication in *In re Tyler*,⁴⁷
 or in any other case cited by counsel, that any distinction is to

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⁴¹ [1891] 3 Ch. 252.⁴² Ibid. 254.⁴³ 1 Mac. & G. 460.⁴⁴ [1891] 3 Ch. 252, 258.⁴⁵ 1 Mac. & G. 460.⁴⁶ [1891] 3 Ch. 252, 259.⁴⁷ [1891] 3 Ch. 252.

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be drawn between a charity incorporated by royal charter and any other charity, and textbook writers, down to the most modern editions, repeat the rule in general terms. See, for example, Tudor on Charities, 5th ed., p. 81: "A gift over from one charity "to another is never void for remoteness"; Gray on the Rule against Perpetuities, 4th ed., p. 572; Theobald on Wills, 10th ed., pp. 280-1; Jarman on Wills, 8th ed., p. 226; Halsbury's Laws of England, 2nd ed., Vol. XXV, p. 119, para. 215. It cannot be doubted that many estates must have been distributed, within the last hundred years, on the footing that the rule as to a gift over from one charity to another is a general rule, as stated in *In re Tyler*⁴⁷ and in the textbooks. In these circumstances, I apprehend that your Lordships would be most reluctant to introduce into the rule the new qualification suggested by counsel.

Further, I am of opinion that there is no logical ground for this qualification. The reason why a gift to charity is not subject to the rule against perpetuities is stated by Lord Macnaghten in *Commissioners for Special Purposes of the Income Tax v. Pemsel*⁴⁸ as follows: "The Court of Chancery has always regarded "with peculiar favour those trusts of a public nature which, "according to the doctrine of the court derived from the piety "of early times, are considered to be charitable. Charitable "uses or trusts form a distinct head of equity. Their distinctive "position is made the more conspicuous by the circumstance "that owing to their nature they are not obnoxious to the rule "against perpetuities, while a gift in perpetuity not being a "charity is void." My Lords, if the reason for upholding a gift to a charity for an indefinite period is that a charity in its nature is not obnoxious to the rule against perpetuities, I fail to see why the same reason should not apply to a gift over from any one charity to any other charity.

For these reasons I reject the novel submission by Mr. Pascoe Hayward which I have already set out.

My Lords, I now come to the last, and, in my view, the most important of the questions which arise on this appeal, viz., the question whether or not the college is a charity in the sense in which that word is used in English law. It is, in my view, regrettable that, in order to find out what is or is not a charity according to English law, it is still necessary to refer to the preamble to a statute passed in the reign of Queen Elizabeth I. That statute (43 Eliz. 1, c. 4), was not passed for the purpose of

⁴⁷ [1891] 3 Ch. 252.⁴⁸ [1891] A.C. 531, 580-1.

giving a definition of "charity," but was directed to providing for the reformation of abuses in the application of property devoted to charitable uses; and the whole of the Act, except the preamble, was repealed by the Mortmain and Charitable Uses Act, 1888; yet, in order to find a comprehensive definition of "charity," it is still necessary first to turn to that Act and then to consider a series of decisions in your Lordships' House and elsewhere, including the case of *Commissioners for Special Purposes of the Income Tax v. Pemsel*.⁴⁹ I take this opportunity of saying that I hope the legislature will soon embark on the task of giving a comprehensive statutory definition of "charity." In the present case, however, I do not think that a prolonged study of the Statute of Elizabeth I, or of the subsequent cases on the meaning of the word "charity," is necessary, and I turn at once to the charter granted by King George III on March 22, 1800, by which the college was established, in order to discover what were the objects with which the college was established.

The charter first recites certain letters patent of King Edward IV, an Act of the reign of King Henry VIII, and certain letters patent of King Charles I, and then continues: "And whereas, "by an Act of Parliament, made and passed in the 18th year "of the reign of our late Royal Grandfather, King George II, "intituled 'An Act for making the surgeons of London, and the " 'barbers of London, two separate and distinct corporations,' "It was enacted, that the said union and incorporation of the "barbers and surgeons of London, made and effected by the "aforesaid Act of the 32nd year of King Henry VIII, should, "from and after June 24, 1745, be dissolved and declared void "and of no effect; and that such of the members of the said "united company who were freemen of the said company, and "admitted and approved surgeons, within the rules of the said "company, and their successors, should from thenceforth be "made, and they were thereby made and constituted, a separate "and distinct body corporate and commonalty perpetual, which "at all times thereafter were to be called by the name of master, "governors and commonalty of the art and science of surgeons "of London, and by the same name might implead and be "impleaded before all manner of justices, in all courts, and in "all manner of actions and suits, and take to them and their "successors, lands, tenements, rents, or hereditaments, not "exceeding the yearly value of £200 in the whole."

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⁴⁹ [1891] A.C. 531.

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Now follow recitals which seem to me to be of the greatest importance: "And whereas, we are informed that the said corporation of master, governors and commonalty of the art and science of surgeons of London, hath become and now is dissolved: And whereas it is of great consequence to the commonweal of this kingdom, that the art and science of surgery should be duly promoted: And whereas, it appears to us, that the establishment of a college of surgeons will be expedient for the due promotion and encouragement of the study and practice of the said art and science." Then begins the operative part of the charter: "Now we . . . by these presents . . . do will, ordain, constitute, and declare, give and grant; unto the aforesaid James Earle and unto all the members of the said late company or corporation of master, governors and commonalty of the art and science of surgeons of London; having been admitted and approved surgeons, within the rules of the said company; and also unto all such persons, who upon, or since, the dissolution of the said corporation, shall have obtained letters testimonial, under a seal purporting to be the seal of the late dissolved corporation, authorizing them to practise the art and science of surgery; and they, from henceforth forever hereafter, shall be and remain by virtue of these presents, one body corporate and politic; by the name of the Royal College of Surgeons in London and by the same name shall and may have perpetual succession, and a common seal."

Then follow powers for the college to acquire and use a hall or council house and other lands for the purposes of the college without incurring any of the penalties in any Statutes of Mortmain.

The charter then goes on to sever the college from the City of London in the following terms: "And it is our further will and pleasure, that nothing in these presents shall be construed to give the Corporation of the City of London any power or jurisdiction over the said college hereby established and incorporated; and that no person, by virtue of these our letters patent, constituted or ordained, or hereafter to be admitted a member of the said college, shall be thereby entitled to any franchise belonging to the freemen of the City of London."

It is then provided that the college "shall and may exercise and enjoy all and singular other the gifts, grants, liberties, privileges and immunities, possessions, real and personal . . . by any Act or Acts of Parliament, or by any letters patent . . . given, granted, and confirmed unto, or otherwise lawfully

“acquired by, and belonging to the said late master, governors, “and commonalty of the art and science of surgeons; or any of “them, and not hereby altered, taken away, changed, or abridged, “made void, or annulled.” It is later provided that the college may elect 21 persons to be the court of assistants, 10 of whom are to be examiners of surgeons for the college; and of these 10 persons, one is to be principal master, and two others are to be governors. Power is given to the master and governors, together with 10 or more of the members of the court of assistants, to hold courts and assemblies and “to make, ordain, confirm, annul, or “revoke, from time to time such by-laws, ordinances, rules, and “constitutions, as to them shall seem requisite and convenient, “for the regulation, government, and advantage of the said “college: so as such by-laws, ordinances, rules, and constitutions “be not contrary to law: and in all such cases as shall be neces- “sary, be examined, approved of, and allowed, as by the laws “and statutes of this realm is provided and required: and also “to transact and ordain all such other matters and things as the “master, governors, and court of assistants of the late dissolved “company or corporation, of the master, governors, and com- “monalty of the art and science of surgeons of London, might “heretofore lawfully do, transact or ordain.”

Then follows an appointment of the first master, governors, examiners, and court of assistants, and provision is made for the election of successors in these offices from time to time. The conditions of membership are stated as follows: “And it is our “further will and pleasure, that after the day of the date of these “presents, no person except those who before the day of the “date of these presents were members of the late corporation of “surgeons, established by the said Act, made and passed in the “18th year of the reign of our royal grandfather, King George II; “and also excepting such persons as shall have received such “letters testimonial as aforesaid, under a seal purporting to be the “seal of the late dissolved company or corporation of surgeons, “shall be capable of becoming a member of the said college “hereby established, unless he shall have obtained letters testi- “monial of his qualification to practise the art and science of “surgery, under the common seal of the college hereby estab- “lished; but every person who shall hereafter obtain such letters “testimonial, under the common seal of the college aforesaid, “shall thereby, by virtue of such letters testimonial, become and “be constituted a member of the said college, subject to all the “regulations, provisions, and by-laws of the said college.”

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The charter goes on to require the examiners of the college to examine candidates for the post of surgeon or assistant surgeon in the army or surgeon or surgeon's mate in the navy, and also to examine all surgeons' instruments to be used in the King's service, and proceeds: "And further, we will that no court or " courts for the examination of any person or persons touching " their skill in surgery, shall ever be held but in the presence of " the master or one of the governors, and five of the members, " at least of the court of examiners of the said college, hereby " established and incorporated as aforesaid."

The rest of the charter need not be quoted for the present purpose.

Your Lordships have heard much argument on the question where, in this charter, the object or objects of the college is or are set out. It is submitted on behalf of the medical school that the usual place in which to find the objects stated is in the operative part of a charter, and not in the recitals; that the last recital merely states the reason of His Majesty for establishing the college and does not state what are to be the objects of the college when established; and that the recital which immediately precedes it is merely the statement of a platitude. My Lords, it may well be that one would expect to find the object or objects stated in the operative part of a royal charter, but I can find no statement of the objects in the operative part of the document now under consideration, although I do find various provisions as to the means by which these objects are to be achieved, and various powers conferred for better enabling the college to achieve these objects. This being so, I have no doubt that the object of this newly created body, the college, is stated in the last recital and is "the due promotion and encouragement of the study and "practice of the art and science of surgery." As I read the words "study" and "practice," they embody two ideas, research in the laboratory and that practical experience which can only be gained by using surgical implements upon human or other bodies. The object of the college is to promote the art and science of surgery by encouraging each of these activities.

My Lords, if this be the true construction of the original charter, can it be doubted that the college is a charity? The object just stated may be regarded as being directed to the relief of human suffering or to the advancement of education or science or to all of these ends. Each of these is a charitable end and it cannot be doubted that in the present case there is no lack of that element of public benefit which is essential if an institution

is to be regarded as a charity. I cannot find in this recital any statement that one of the objects of the new college is to be the promotion of the interests of individuals who are carrying on their profession as surgeons, nor can I find any reference to the promotion of the interests of such individuals in any other part of this charter. I state this at once, in view of the observations of the Court of Appeal in the 1899 case, to which I must refer later.

So far I have considered only the charter of 1800 by which the college was established, but the later charters, in so far as they are relevant, support my view that the object of the college is to be found in the last recital of the charter of 1800. In the charter of 1822 the last recital is: "And whereas it appears to us to be expedient, in order more effectively to promote and encourage the study and practice of the said art and science of surgery, that further powers and privileges be granted to the said royal college," and the same words "in order more effectively to promote and encourage the study and practice of the said art and science of surgery" appear in the last recital to the charter of 1843. I refrain from any detailed reference to the other charters or to the by-laws, as I cannot find, either in the charter of 1800, or in any subsequent charter, or in the by-laws, any statement of the objects of the college, as distinct from the methods by which these objects are to be pursued.

My Lords, for these reasons, had the matter been wholly free from authority, I should have felt no doubt that the college was a charity. I must shortly consider the decision of the Court of Appeal in the 1899 case, by which the Court of Appeal has found itself bound, but it will be convenient to turn first to two cases which dealt with the position of the Institution of Civil Engineers. The first is *Inland Revenue Commissioners v. Forrest*,⁵⁰ a decision of this House. The question which arose in that case was whether the Institution of Civil Engineers was liable to the duty imposed by section 11 of the Customs and Inland Revenue Act, 1885, or came within the exemption granted by subsection (3) of that section. Subsection (3) exempts from the duty in question "property which, or the income or profits whereof, shall be legally appropriated and applied for any purpose connected with any religious persuasion, or for any charitable purpose, or for the promotion of education, literature, science, or the fine arts." It was contended on behalf of the institution that its property was legally appropriated and applied for the promotion of science,

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and your Lordships' House accepted this contention. It was argued by counsel for the Commissioners of Inland Revenue that the main and primary object of the institution was to promote the interests of the profession of engineers and not to increase scientific knowledge. This argument was rejected by Lords Watson and Macnaghten, Lord Halsbury L.C. dissenting. Lord Watson said ⁵¹: "I do not doubt that membership is accompanied " with a certain amount of prestige which may prove to be of " service to the member in his professional career; but I believe " that the same result would attend membership of any society " which effectively promoted a branch of science intimately con- " nected with the profession or business in which the member was " engaged. That there is a science of civil engineering, and that " its development is of the utmost consequence to our national " interest, are to my mind propositions not admitting of dispute." Lord Macnaghten said ⁵²: "The question at issue may be stated " shortly. Is the property of the Institution of Civil Engineers " legally appropriated and applied for the promotion of the science " of civil engineering, or is it legally appropriated and applied for " the benefit of civil engineers in order to enable them to practise " their profession to greater advantage? It cannot, I think, be " doubted that the institution has raised the standard of the " profession, and that, to a civil engineer, it is of advantage, and " probably of pecuniary advantage, to be a member. But is that " result the purpose of the society, or is it an incidental, though " an important and perhaps a necessary consequence of the way in " which the institution does its work in the pursuit of science?"

My Lords, I think that the words of Lords Watson and Macnaghten may aptly be applied to the present case, with the substitution of "the college," "the science of surgery" and "surgeons" for "the Institution of Civil Engineers," "the science of civil engineering" and "civil engineers."

The matter was carried a stage further, as regards the Institution of Civil Engineers, by the decision of the Court of Appeal in *Institution of Civil Engineers v. Inland Revenue Commissioners*.⁵³ In that case the question was whether the institution was "a body of persons . . . established for charitable purposes only" and was, therefore, exempt from income tax under section 37 (1) (b) of the Income Tax Act, 1918. Rowlatt J. held that the institution was not established for charitable purposes only. On the charter of the institution and its by-laws he found that,

⁵¹ 15 App.Cas. 334, 351.

⁵² Ibid. 354.

⁵³ [1932] 1 K.B. 149.

although one of the objects of the institution was undoubtedly to enlarge the knowledge of mankind in regard to mechanical science, the institution had also as an object the organization of the profession of civil engineers by giving to those who passed the necessary examination and became members of the institution the exclusive right to affix to their names certain designations. The members became known to the public as persons belonging to the institution, and as members they were required to observe certain rules for the protection of clients. That was collateral to the acquisition or spread of knowledge of mechanical science and was an object which could on no view be called charitable. His decision was reversed by the Court of Appeal, and Lord Hanworth, after referring to the charter and by-laws, said ⁵⁴: "The question of law that arises upon these matters of fact is this: do these other activities represent a collateral or independent purpose, or are they subsidiary and incidental to the main object for which the institution was started and incorporated?" He held that the latter was the true view, and Lawrence L.J., in agreeing, said,⁵⁵ after referring to *Forrest's* case⁵⁶: "It follows, in my judgment, that the institution is established for a charitable purpose only, notwithstanding that it is of advantage to a civil engineer in his profession to be a member of the institution, this result not being a purpose for which the institution was established but being incidental to and consequent upon the way in which the institution carries out the charitable purpose for which alone it was established." I have referred in detail to this decision of the Court of Appeal, because in *Forrest's* case,⁵⁶ as Lord Macnaghten pointed out, it was not necessary for this House to consider whether the promotion of science was the *only* purpose for which the property sought to be charged was legally appropriated and applied.

I now come to *In re Royal College of Surgeons of England*,⁵⁷ and it will be convenient to refer to the report in the Tax Cases, as the history of the case is there fully set out. In that case the Court of Appeal had to consider whether the college was liable to the duty imposed by section 11 of the Customs and Inland Revenue Act, 1885 (the same section which had to be considered by your Lordships' House in *Forrest's* case⁵⁸), or came within the exemption contained in subsection (3) of that section. Before the Commissioners the college had relied upon the words "for the

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⁵⁴ [1932] 1 K.B. 149, 163.⁵⁵ Ibid. 171.⁵⁶ 15 App.Cas. 334.⁵⁷ [1899] 1 Q.B. 871; 4 Tax Cas. 344.⁵⁸ 15 App.Cas. 334.

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“promotion of education, literature, or science” which appear in subsection (3). When the case came before a Divisional Court of the Queen’s Bench Division, it would appear that counsel relied only upon the words “legally appropriated and applied for the “promotion of science,” and this was the only argument put forward when the case came before the Court of Appeal. It is difficult to understand why counsel did not rely upon the words “for any charitable purpose” and why they ceased to rely on the words “for the promotion of education,” as both of these purposes come within the exemption conferred by subsection (3). However, both the argument in the Court of Appeal, and the judgment of the court, which was delivered by Romer L.J., concentrated on the words “legally appropriated and applied for the “promotion of science.”

Romer L.J. said ⁵⁹: “It is contended by the appellants that “the property is exempt from duty under subsection (3) of “section 11 of the Act, as being property which, or the income “or profits whereof, is or are legally appropriated and applied for “the promotion of science. In order to see whether this contention is correct or not it is important to ascertain what is the “main purpose and object of the college.” After referring to *Forrest’s* case,⁶⁰ he continued: “Now the case before us differs “essentially from the case of the Institution of Civil Engineers “before the House of Lords. That institution had only one main “object and purpose. The college has two main objects, each “of great importance, in fact, it would be difficult to say which “of the two main functions imposed on and discharged by the “college is the more important. Neither can be considered as “merely subsidiary to the other. The one may be shortly “described as the promotion of the science of surgery. The other “is the promotion and encouragement of the practice of surgery, “including the promotion of the interests of those practising, or “about to practise, surgery as a profession, and also including “the examination of students and others to qualify for practice “or honours in surgery or kindred subjects.”

My Lords, I need quote no more of the judgment, for these words reveal at once the difference between the view which I hold of the construction of the charters, and the view taken by the Court of Appeal in the 1899 case. If I understand the judgment aright, that court thought that “the promotion of the interests of “those practising, or about to practise, surgery as a profession”

⁵⁹ [1899] 1 Q.B. 871, 876-7; 4 Tax Cas. 344, 362-3. ⁶⁰ 15 App.Cas. 334.

was one of the main objects of the college. I do not so read the charters. I think that the promotion of the interests of practising surgeons is "an incidental, though an important and perhaps a "necessary, consequence" of the work of the college in carrying out its main object, the promotion and encouragement of the study and practice of the art and science of surgery.

The distinction between an institution whose main object is the promotion and advancement of a science and an institution whose main object is the protection and advantage of those practising a particular profession is well illustrated by a comparison of the judgments in the two cases, already cited, relating to the Institution of Civil Engineers, with the judgments in the cases of *Society of Writers to Her Majesty's Signet*⁶¹ and *Sulley v. Royal College of Surgeons, Edinburgh*.⁶²

Counsel for the medical school relied upon the case of *Miley v. Attorney-General for Ireland*.⁶³ In that case the Court of Appeal in Ireland held that the College of Surgeons in Ireland was incorporated with two main objects, the promotion of the science of surgery and the promotion of the interests of those practising the profession of surgery, the latter not being a charitable object. It was accordingly held that a legacy to that college was not a charitable bequest. The language of the charters of the Irish college appears to differ in some respects from the language of the charters now under consideration, and the decision may be justified on that account; but I think that Barton J. in the court of first instance, and two at least of the members of the Court of Appeal, attached importance to the views on construction which had been expressed by the English Court of Appeal in the 1899 case, and I have already expressed my disagreement with these views.

The arguments on this point before your Lordships' House ranged over a wide field, and many portions of the charters and by-laws were relied on as showing that the protection of the interests of the profession was one of the main objects of the college. I have anxiously considered all these arguments, but I have decided not to increase the length of this speech by discussing them in detail. Suffice it to say that, in my view, each and all of the powers conferred upon the college and the regulations made by the charters and by-laws were powers and regulations conferred and made for the purpose only of enabling

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⁶¹ 14 R. 34; 2 Tax Cas. 257.⁶³ [1918] 1 I.R. 455.⁶² 1892, 29 S.L.R. 620; 3 Tax Cas.

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the college the better to achieve its charitable objects, and any benefit to the profession resulting from the exercise of these powers or the carrying out of these regulations was incidental to the carrying out of the main purpose for which the college was incorporated, as stated in the last recital of the charter of 1800. I have already stated the construction which I place on that recital.

I would add that, in my opinion, your Lordships could not decide against the college in this case without drawing too fine a distinction between the relevant documents in the case of the Institution of Civil Engineers and the relevant documents in the present case. It is true that in the first charter of that institution, dated June 3, 1828, it appears that the institution was the direct successor of a society formed for "the general advancement of mechanical science and more particularly for promoting the acquisition of the species of knowledge which constitutes the profession of a civil engineer," and the institution is stated to be formed "for the purposes aforesaid." But if I am right in thinking that the last recital to the college's charter of 1800 states the object of the college, and that object is charitable, there is no distinction, so far, between the college and the institution; and a general comparison of the charters and by-laws of these two bodies respectively leads me to think that it would be very difficult to draw a distinction between them in favour of the Institution of Civil Engineers.

I have not referred to the evidence filed in this case, because it is said that the manner in which the college has in fact carried out its functions is irrelevant for the present purpose. I am content to assume that this is so, and I have not relied on that evidence in any way in reaching my conclusion; but it is satisfactory to learn, from the affidavit of Lord Webb-Johnson, how well-founded have been the happy expectations expressed in the charter of 1800.

I would allow the appeal and declare that the proviso contained in clause 11 of the will of the testatrix is valid and has come into operation, and that on July 5, 1948, the endowment fund referred to in clause 10 of the said will became transferable to the college for the general purposes of the college.

In the special circumstances of this case I would leave undisturbed the order of the Court of Appeal as to costs and would direct that the costs of the appeal to this House be taxed as between solicitor and client and paid out of the corpus of the said endowment fund.

LORD REID. My Lords, I agree, and I shall only add a few observations on the question whether the college is a charity. I do not think that great precision can be expected in the definition in old charters of the objects of an institution. In the absence of any contemporanea expositio I think that it is enough that all the indications in the charters point to the object of the college being the advancement of the knowledge and skill necessary for successful surgery and not the advancement of the professional position of its individual members. I do not think that the intention of the charter of 1800 was to make the new college like the old city corporation which had already been dissolved. It is true that the court of assistants was given power to transact and ordain such matters and things as the old corporation might lawfully have done, but this appears to me to have been intended to confer powers of administration and not to have been intended to expand the object set out in the recitals, "the due promotion and "encouragement of the study and practice of the said art and "science," i.e., the art and science of surgery.

If there were anything to show that the affairs of the college had been so conducted that the advancement of the interests of its members had become one of its main purposes, it may be that this would disentitle the college from pleading that it is a charity, but I do not find anything of that kind. The by-laws give disciplinary powers and provide for the protection of fellows and members in the exercise and enjoyment of their rights and privileges as fellows and members, but I do not think that this means that they are to be disciplined, protected or aided as practising surgeons. As I read it, it refers only to their position as fellows and members of the college, and the powers are powers which any college might have for its own protection. And I can find nothing in the affidavit of Lord Webb-Johnson which indicates a departure from the original object of the college.

It is true that in *In re Royal College of Surgeons of England*⁶⁴ the Court of Appeal took a somewhat different view. There the case for the college was that its property was legally appropriated and applied for the promotion of science, and the court held, I think rightly, that this was not the only purpose for which the property was held and used. The promotion of science is one way of promoting the study and practice of the art and science of surgery, but it is not the only way. It appears that the college has for long made the examination of students one of its main

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⁶⁴ [1899] 1 Q.B. 871.

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purposes. I would not regard that as the promotion of science, but I would regard it as the promotion of education and within the general object of the college. For some reason which cannot now be discovered the college did not maintain in 1899 that, in so far as its property was not applied to the promotion of science, it was applied to the promotion of education; had it done so I think that it ought to have succeeded. I do not think that it could have relied on the words "or for any charitable purpose" in section 11 of the Customs and Inland Revenue Act, 1885, because it had been decided in *Inland Revenue Commissioners v. Scott*⁶⁵ that in that particular statute those words are used in a narrow sense. The difficulty created by the 1899 case arises from the way in which Romer L.J. described the second, non-scientific, object of the college. He referred to it⁶⁶ as including not only the examination of students and others but also "the promotion" and encouragement of the practice of surgery, including the "promotion of the interests of those practising, or about to "practise, surgery as a profession." It is the last part of the passage which I have quoted which I venture to think is going too far. I think that promoting the practice of surgery is a different thing from promoting the interests of those who practise surgery. Surgery obviously has a practical as well as a scientific side; it is an art as well as a science. When the charter speaks of promoting the practice of the art of surgery I think that it refers to promoting the practical side of surgery and not to promoting the interests of those practising surgery, and I think that the evidence in this case shows that the college has carried out the intention of its charter.

LORD TUCKER. My Lords, the Court of Appeal were unanimous in holding that, on the true construction of clause 11 of the will of the late Lady Edith Goff Bland-Sutton, the Middlesex Hospital had, in the events which happened, "become "nationalized" within the meaning of that clause, with the result that the gift over, if valid, took effect. I agree, and have nothing to add on this part of the case.

In your Lordships' House a new point not relied on in the Court of Appeal was advanced by the respondents to the effect that the gift over was not saved from the rule against perpetuities unless both before and after the gift over takes effect the property in question is inalienable because it is held on trust and that the

⁶⁵ [1892] 2 Q.B. 152.

⁶⁶ [1899] 1 Q.B. 871, 877.

property of the Royal College of Surgeons, a body incorporated by charter, is not impressed with a trust nor is the corporation subject to the doctrine of ultra vires as in the case of statutory corporations. It is said that the language used by Lord Cottenham in *Christ's Hospital v. Grainger*⁶⁷ in the year 1848 was wider than was necessary for the decision on the facts of that case, and that it has ever since been erroneously considered to apply in all cases where the gift over is from one charity to another. On this point I agree with your Lordships that the real reason for this exception to the rule against perpetuities is to be found in the fact that the court leans in favour of charity, and that in any event an interpretation which has been accepted and acted upon for more than a hundred years should not now be disturbed.

The last and more difficult question is whether the gift over can in any event take effect in favour of the College of Surgeons, in other words: Are the objects of the college exclusively charitable? which can for the sake of brevity be expressed as: Is the college a charity? Danckwerts J. held that it is, but the Court of Appeal felt themselves compelled to the contrary view by the construction which had been placed on the charters of the college by the Court of Appeal in the case of *In re Royal College of Surgeons of England*,⁶⁸ in a judgment delivered by Romer L.J., in which it was held that the college had two main objects: (1) the promotion of the science of surgery, and (2) the promotion and encouragement of the practice of surgery, including the promotion of the interests of those practising or about to practice surgery as a profession, and also including the examination of students and others to qualify for practice in honours in surgery. In that case the court was concerned with an exemption in favour of "property which, or the income or profits whereof, shall be "legally appropriated and applied . . . for the promotion of . . . "science" under section 11 of the Customs and Inland Revenue Act, 1885. But although the question in issue was different from that in the present case it did necessitate an inquiry into the purposes of the college as shown in its charters, and it was held that the college had the two main objects stated above neither of which could be considered as subsidiary to the other. Accordingly the Court of Appeal in the instant case felt bound to proceed on the basis of the existence of these two main objects, with the necessary consequence that the college could

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⁶⁷ 1 Mac. & G. 460.⁶⁸ [1899] 1 Q.B. 871.

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not be held to be a charity. My Lords, although I do not question the correctness of the actual decision of the Court of Appeal in the 1899 case, I am unable to accept the construction put upon the charters by the court. The relevant passage in the first charter of 1800 is in the fifth paragraph of the recitals and is as follows: "And whereas we are informed that the said "corporation of master, governors and commonalty of the art "and science of surgeons of London, hath become and now is "dissolved: And whereas, it is of great consequence to the "commonweal of this Kingdom, that the art and science of "surgery should be duly promoted: And whereas, it appears to "us, that the establishment of a college of surgeons will be "expedient for the due promotion and encouragement of the "study and practice of the said art and science, Now We, . . . "do will, ordain, constitute, and declare, give and grant," etc. Similar language is used in the subsequent charters of 1822 and 1843.

Nowhere in the operative parts of the charters are there to be found any expressed objects, but it is, I think, clear from the language of the charters taken as a whole that the objects of the college in the present case are to be found in the recitals taken in conjunction with what follows in the operative parts, and indeed the charters were so construed by the Court of Appeal in the 1899 case.

In my view, the objects of the college as set out in the charter of 1800, and never thereafter varied, were (1) the promotion of the science of surgery; (2) the promotion of education in surgery. The latter can only be achieved by practice as well as study, and the holding of examinations is an essential step in the educational process. I can find nothing to warrant the view that in this context the word "practice" means the carrying on of their professional activities for pecuniary gain by the members of the college or the profession at large. The remaining provisions of the charters and the by-laws made pursuant thereto are all governed by the language of the recital, and are to be construed as conferring the necessary powers incidental to the previously expressed purposes of the college. The fact that provision is made for some measure of disciplinary control over the members, and that the college undertakes to protect its fellows, members and licentiates in the exercise and enjoyment of the rights and privileges acquired by them as diplomates of the college (by-law XV) are examples of such incidental powers, there being nothing

in the charters to suggest that the college was established to further the interests of the profession or the enforcement of professional discipline.

It was argued that whatever is the proper construction to be put on the words in the recital standing by themselves yet having regard to the fact that the college was established in place of the dissolved company called "The master, governors and "commonalty of the art and science of surgeons of London" and was expressly given power "to transact and ordain all such "other matters and things as the master, etc., of the late "dissolved company or corporation might heretofore lawfully do, "transact, or ordain" it was thereby given powers co-extensive with those of the dissolved corporation the precise objects of which are not known but whose members enjoyed certain liberties and franchises within the City of London and as to which there are no grounds for presuming it to have been a charity.

It does not, however, appear from the charter that the college was in every respect a successor to the previous company. The old company had ceased to exist. We do not know the date. A new body was created. It was expressly provided that the Corporation of the City of London should have no jurisdiction over the college and that no member of the college should by virtue of the charter be entitled to any franchise belonging to the freedom of the City of London. The college, however, enjoyed all the other privileges and possessions granted by previous Acts or letters patent or otherwise acquired by the former company.

We have, therefore, a new entity divorced from the City—with no guild taint attaching to it—but holding the property of the old company and having expressly conferred on it one of the functions of the old company, viz., the dissecting and anatomizing of the bodies of murderers. It is, however, expressly established for the purposes previously stated and I cannot find anything in the charter to suggest that its objects are intended to be extended by implication beyond the promotion and encouragement of the study and practice of surgery. No provision is made for a general meeting of the members of the college but the conduct of its business and the power to make by-laws, etc., is committed to a court of assistants on whom are conferred the same powers as were vested in the court of assistants of the dissolved company. This is merely the machinery of government and does not extend the powers of the college beyond what is necessary for carrying out the previously expressed purposes for which it had been established.

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I am accordingly of opinion that, on the true construction of its charters, the College of Surgeons of England is a charity, and that this appeal should succeed.

LORD COHEN. My Lords, I agree with your Lordships that the event on the occurrence of which the testatrix directed that the gift over in favour of the Royal College of Surgeons (hereinafter sometimes referred to as "the college") should take effect has taken place, and I cannot usefully add anything to the reasons given by your Lordships for affirming the decision of the Court of Appeal on that point.

The gift over may obviously take effect beyond the time allowed by the rule against perpetuities. It can only be valid, therefore, if it can be brought within the exception in favour of charities which was laid down by Lord Cottenham L.C. in *Christ's Hospital v. Grainger*⁶⁹ in the following terms: "It was 'then argued that it' (a gift over in favour of the Corporation of London for the benefit of Christ's Hospital) 'was void, as 'contrary to the rules against perpetuities. These rules are to 'prevent, in the cases to which they apply, property from being 'inalienable beyond certain periods. Is this effect produced, 'and are these rules invaded by the transfer, in a certain event, 'of property from one charity to another? If the Corporation 'of Reading might hold the property for certain charities in 'Reading, why may not the Corporation of London hold it for 'the charity of Christ's Hospital in London? The property is 'neither more nor less alienable on that account.'"

Mr. Pascoe Hayward said that the college is not a charity which comes within the exception recognized in *Christ's Hospital v. Grainger*⁷⁰ for two reasons: (1) That exception only applies to cases where property is given over to trustees upon charitable trusts and not to cases of a gift over direct to a charitable corporation incorporated by royal charter. (2) In any event the Royal College of Surgeons is not a charitable corporation, since one of its main objects is in effect the object of a professional protection society and this is not charitable.

The first point was taken in the court below but only in order that it should be reserved for this House. We have not the assistance of the Court of Appeal on it. It derives support from the judgment of Ronan L.J. in the Irish case of *Miley v. Attorney-General for Ireland*,⁷¹ and is based on the passage in

⁶⁹ 1 Mac. & G. 460, 464.

⁷¹ [1918] 1 I.R. 455.

⁷⁰ 1 Mac. & G. 460.

Lord Cottenham's judgment in which he gave as the reason for his decision that the property did not become more or less alienable by reason of a gift over from one charity to another. This, said Mr. Pascoe Hayward, cannot apply to a gift over from a charity created by declaration of trust to a corporation incorporated by royal charter, since such a corporation has all the powers of an individual. (See *Baroness Wenlock v. River Dee Co.*⁷²) If it disregards some expressed limitation in its charter, it is not acting ultra vires. It cannot be restrained by injunction if it disregards the limitation; it only runs the risk that on an application by the Attorney-General by writ of scire facias, its charter may be rescinded. A gift over to a chartered corporation cannot therefore be said to fulfil the condition that the property should be neither *more* nor less alienable.

In my opinion, this argument is not well founded. In the first place, the exception has always been regarded by textbook writers in the 100 years that have elapsed since the case was decided as applying to all charities whether their charitable character was derived from a document creating a trust or from the terms of a charter. Secondly, although there is no direct decision on the point, the decision in *In re Tyler*⁷³ proceeded on the basis that a gift over from the trustees of charity A to charity B, a charitable corporation incorporated by royal charter is valid. In *In re Lopes*⁷⁴ it was admitted by counsel⁷⁵ that such a gift over was valid. Thirdly, even if the decision in *Christ's Hospital v. Grainger*⁷⁶ is, as suggested in Gray on Perpetuities, 4th ed., pp. 572-578, illogical, we should make matters worse if we were to accept Mr. Pascoe Hayward's argument on this point. The policy behind the decision in *Christ's Hospital v. Grainger*⁷⁶ was, in my opinion, the leaning of the court in favour of charity. I can see no reason why that leaning should prevail in favour of charitable trusts declared by a will or trust instrument and yet be disregarded when the gift over takes the form of a direct gift to a charitable corporation.

Before parting with this branch of the case I would add that the statement by Mr. Pascoe Hayward that a corporation incorporated by a royal charter cannot be restrained by injunction from disregarding a restriction imposed by its charter is too wide. It has been held that such an injunction will be granted at the instance of a member since a member should be allowed to

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⁷² 36 Ch.D. 675n., 685n.⁷³ [1891] 3 Ch. 252.⁷⁴ [1931] 2 Ch. 130.⁷⁵ Ibid. 133.⁷⁶ 1 Mac. & G. 460.

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prevent his rights being defeated by an application by the Attorney-General to rescind the charter. See *Jenkin v. Pharmaceutical Society of Great Britain*.⁷⁷ Moreover, in some cases, at any rate, charitable corporations are by reason of their charitable objects necessarily trustees of their corporate property and are, therefore, like other trustees subject to the jurisdiction of the Court of Chancery. See Halsbury's Laws of England, 2nd ed., Vol. IV, p. 336, para. 566.

The second point, to my mind, presents much greater difficulty. Mr. Pascoe Hayward suggested that we could not decide against him unless we were prepared to overrule the decision of the Court of Appeal in *In re Royal College of Surgeons of England*.⁷⁸ That was a step which the Court of Appeal in the present case did not consider themselves at liberty to take, and there are undoubtedly dicta in the judgment of the court which lend support to their view. I agree, however, with Danckwerts J. that the question which we have to decide was not really before the Court of Appeal in the 1899 case. That was a decision upon section 11 of the Customs and Inland Revenue Act, 1885, which granted exemption from corporation duty inter alia on "property which, or the income or profits whereof, shall "be legally appropriated and applied for any purpose connected "with any religious persuasion, or for any charitable purpose, or "for the promotion of education, literature, science, or the fine "arts." In the 1899 case the college did not rely on the words "for any charitable purpose," nor on the word "education." An issue, and the only relevant issue, argued and decided was whether or not the income or profits derived from the property of the college was legally appropriated and applied for the promotion of science. The Court of Appeal decided this question against the college. Sir Robert Romer L.J., who delivered the judgment of the court, relied very largely on those provisions of the charter which dealt with the examining functions of the college. These were undoubtedly important functions and could hardly be said to be purely ancillary to its other objects. It may well be that they cannot be said to be purposes connected with the promotion of science: but we are concerned with the wider question of charitable objects in general, one of which is education. In my opinion, the examining functions of the college are so much connected with education that I do not think they

⁷⁷ [1921] 1 Ch. 392.

⁷⁸ [1899] 1 Q.B. 871; 4 Tax Cas. 344.

deprive the college of any charitable character which it might otherwise possess.

I have not overlooked that in the 1899 case *Romer L.J.* said ⁷⁹ :
 “ It was finally determined by the House of Lords in the case
 “ of *Inland Revenue Commissioners v. Forrest* ⁸⁰ that if the
 “ main purpose or object of an institution be the promotion of
 “ science, though there may be some subsidiary purposes or
 “ objects, then this property, having to be applied and being
 “ applied for the purposes of the institution, is legally appro-
 “ priated and applied for the promotion of science within the
 “ meaning of those words as used in the Act, and is accordingly
 “ exempt from duty. Now the case before us differs essentially
 “ from the case of the Institution of Civil Engineers, before the
 “ House of Lords. That institution had only one main object
 “ and purpose. The college has two main objects, each of great
 “ importance; in fact, it would be difficult to say which of the
 “ two main functions imposed on and discharged by the college
 “ is the more important. Neither can be considered as merely
 “ subsidiary to the other. The one may be shortly described as
 “ the promotion of the science of surgery. The other is the
 “ promotion and encouragement of the practice of surgery,
 “ including the promotion of the interests of those practising, or
 “ about to practise, surgery as a profession, and also including
 “ the examination of students and others to qualify for practice
 “ or honours in surgery or kindred subjects.”

I can well understand that the Court of Appeal felt a difficulty, in view of those observations, in deciding the present case against the respondent, but the observations should be read in the light of the point to which the Court of Appeal was then directing its attention. I think, therefore, that, even if we now decide in favour of the college, it does not necessarily follow that the decision in the 1899 case was wrong on the question then decided in the light of the evidence then before the court.

Our attention was also directed to cases in which the character of the bodies in Scotland and Ireland corresponding to the Royal College of Surgeons in England arose for consideration. In the Scotch case (*Sulley v. Royal College of Surgeons, Edinburgh* ⁸¹) the question was whether the defendants could claim exemption from income tax under Schedule A in respect of a building on the ground that it was “ property of any literary or scientific

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⁷⁹ [1899] 1 Q.B. 871, 877; 4 Tax Cas. 344, 363. ⁸¹ 1892, 29 S.L.R. 620; 3 Tax Cas. 173.

⁸⁰ 15 App.Cas. 334.

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“ institution, used solely for the purposes of such institution, and
“ in which no payment is made or demanded for any instruction
“ there afforded, by lectures or otherwise.” It was held that
the defendants were not a scientific institution and therefore
not entitled to exemption. The court came to the conclusion, on
the evidence in that case, that the defendants’ primary and
proximate objects were professional, that its methods squared
with the requirements of the profession and that if it furthered
research it did so only incidentally and indirectly (see *per* the
Lord President ⁸²). Both the facts in that case and the question
for decision differed so much from the case before us that I do
not get any assistance from it in deciding the present case.

In the Irish case (*Miley v. Attorney-General for Ireland* ⁸³)
the question for decision was similar to that before us. The
court held that the Royal College of Surgeons in Ireland had
been incorporated with two main objects, the promotion of the
science of surgery, and the promotion of the interests of those
practising the profession of surgery, and that the latter was not
a charitable object. The only evidence before the court were the
charter and the by-laws of the college, and it appears from the
judgment of O’Brien L.C.⁸⁴ and of Molony L.J.⁸⁵ that the
charter itself contained elaborate provisions for disciplining the
members of the Irish college and others connected with the
profession, and that the oath required of licentiates was of a
more professional character than that required of the governors
and examiners of the college. The Chancellor said ⁸⁶: “ I am
“ satisfied from a consideration of these and other clauses to be
“ found in the charters that by the incorporation of this body
“ with such great powers there was to be effected the second
“ great object I have mentioned—that of keeping the profession
“ of surgeons honourable in its conduct, and of ensuring its
“ discipline, so that anything in the nature of unprofessional
“ conduct could be punished by the corporate body. It was
“ further pointed out in the course of the argument that until
“ comparatively recent times the system of apprenticeship pre-
“ vailed, under which a youth was apprenticed to a member of
“ the body in the same manner as to a land agent or stockbroker.
“ This apprenticeship might be either indoor or external; it was
“ open to the body to regulate the fees and emoluments of the
“ member to whom an apprentice was bound, and it might also

⁸² 1892, 29 S.L.R. 620, 623; 3 Tax
Cas. 173, 182.

⁸³ [1918] 1 I.R. 455.

⁸⁴ Ibid. 462.

⁸⁵ Ibid. 475.

⁸⁶ Ibid. 462-3.

“insist that no one should be admitted as a licentiate unless he
 “had been previously apprenticed to a member of the body. It
 “would also be open and legitimate to the body to expend money
 “on providing the necessary machinery for the detection or pre-
 “vention of anything which might be regarded as casting a slur
 “on the honour and character of the profession.” Molony L.J.
 referred also to the by-laws which contained strong indications—
 particularly in defining the duties of the general purposes com-
 mittee—of a professional objective. He said⁸⁷: “It is clear,
 “therefore, that one of the objects of the college is to become
 “acquainted with all intended legislation, and to take all proper
 “steps to safeguard the interests of the profession, and in
 “furtherance of this object, if need be, to send deputations to
 “London or elsewhere on the business of the college, and to pay
 “the expense of such deputations out of the corporate funds.
 “This object is, no doubt, very useful, but in no sense can it be
 “regarded as charitable.” The differences between the charters
 and by-laws of the Irish college and those of the Royal College
 of Surgeons in England are, however, such that I cannot regard
 the decision of the Court of Appeal in Ireland as a decision of the
 question we have to consider.

Mr. Pascoe Hayward said that it was clear from the charters
 of the college and its by-laws that it had objects which were not
 exclusively charitable and that, as it had non-charitable objects
 which were not to be accomplished only in the course of
 and in pursuit of the main charitable objects, the appeal must
 necessarily fail.

Mr. Cross, on the other hand, contended that the main
 objects of the college were clearly charitable, and that if in so
 far as it had other objects such other objects were purely ancillary
 to the main objects. He relied on the last two recitals in the
 charter of 1800 and the last recitals in the charters of 1822 and
 1843 respectively as declaring the objects of the college in terms
 which he argued were clearly charitable. He also referred to the
 paragraphs in Lord Webb-Johnson’s affidavit which deal with
 the current activities of the college. I doubt whether this latter
 evidence is admissible. We are concerned not with what the
 college is in fact doing now but with what it is authorized to do,
 and I do not think we are entitled to construe its charters of
 1800, 1822 and 1843 by evidence of its actions in 1948.

In support of his argument, Mr. Cross referred us to two

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⁸⁷ [1918] I.R. 455, 478.

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decisions in relation to the Institution of Civil Engineers. In the first (*Inland Revenue Commissioners v. Forrest* ⁸⁸) the question was as to the right of the institution to exemption from duty under section 11 of the Customs and Inland Revenue Act, 1885. The House held that the institution was entitled to exemption as being formed not for the professional ends of individuals but for the promotion of science within section 11. In the second (*Institution of Civil Engineers v. Inland Revenue Commissioners* ⁸⁹) the question was whether the institution was established for charitable purposes only within section 37 (1) (b) of the Income Tax Act, 1918. The Court of Appeal decided in favour of the institution. The charter of the institution contained a recital, similar to the last recitals in the 1800 charter of the college, to the effect that it was in the national interest to establish an institution for "the general advancement of mechanical science, and more particularly for promoting the acquisition of that species of knowledge which constitutes the profession of a civil engineer, being the art of directing the great sources of power in nature for the use and convenience of man." The charter of the institution differed from the 1800 charter of the college in that it expressly declared that the institution was incorporated for the purpose specified in the recital. This seems to me a material difference as it clearly defines the main purpose of the institution. I cannot, therefore, agree with Mr. Cross, that the decision of the Court of Appeal as to the status of the college in 1899 was, or that any decision we might give in favour of the respondents in the present case would necessarily be, inconsistent with the decisions of the House of Lords and the Court of Appeal on the status of the Institution of Civil Engineers. I do, however, find assistance from certain passages in the judgments of the Court of Appeal. Thus Lord Hanworth M.R. says ⁹⁰: "As Rowlatt J. has said, there may be a charitable institution for the relief of sickness, and incidental advantages can be gained by a subscriber to the funds without the institution losing its character; but if there is an object, e.g., the promotion of the profession in addition to the promotion of science that is collateral and not merely incidental, the result is that the institution cannot be described as established for charitable purposes only. I confess that I have a difficulty in attaching the same weight as was given to it by the Commissioners and the learned judge to the fact that members of the institution

⁸⁸ 15 App.Cas. 334.

⁹⁰ [1932] 1 K.B. 149, 161-2.

⁸⁹ [1932] 1 K.B. 149.

“ can attach letters as suffixes to their names. The requirement
 “ of the institution whereby its members have to possess an
 “ adequate qualification does not appear to me to connote an
 “ advantage, amounting to a collateral purpose in the sense
 “ above. That its members should bring a certain knowledge and
 “ capacity for learning to the institution seems only to confirm
 “ its purpose of the general advancement of mechanical science
 “ and knowledge.” Then, again,⁹¹ he refers to an observation
 of Lord Macnaghten when he points out that where a society is
 incorporated, and its purpose defined by charter or statute, it is
 not right to confuse the purpose of the society with the objects
 of individuals in joining it.

With these principles in mind I return to the charters and
 by-laws of the college and would refer first to the last two recitals
 in the charter of 1800, which read as follows: “ And whereas, it
 “ is of great consequence to the commonweal of this kingdom,
 “ that the art and science of surgery should be duly promoted:
 “ And whereas, it appears to us, that the establishment of a
 “ college of surgeons will be expedient for the due promotion and
 “ encouragement of the study and practice of the said art and
 “ science.” Had these been the only recitals and had the charter
 gone on to provide, as did the charter of the Institution of Civil
 Engineers, that the college was incorporated for the purposes
 specified in the recitals, I should, I think, have agreed with your
 Lordships that the only main object of the college was charitable
 and that any professional object which might be deduced from
 the reference to the practice of the art of surgery was merely
 ancillary to the main object. This view would have been rein-
 forced by the concluding recitals in the charters of 1822 and 1843.

Unfortunately, the words of incorporation do not contain any
 direct reference to the material recitals and these are preceded
 by an historical account of the predecessors in title of the college,
 all of which appear to have been in the nature of trade guilds
 under the jurisdiction of the Corporation of London and conferring
 on their members franchises as freemen of the City of London.
 None of these predecessors could, I think, have claimed that their
 non-charitable activities were merely ancillary to a main object
 which was charitable. The last of such predecessors is, however,
 stated in the recitals to have been dissolved, and although under
 the operative part of the charter its privileges and properties are

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confirmed to the college, it is expressly provided that the Corporation of London is to have no jurisdiction over the college nor are the members of the college to be freemen of the City of London.

It is, therefore, argued that the college is not in any sense a trade guild. On the other hand, it is to be observed that the master, governors and court of assistants are given power to make by-laws for the regulation, government and advantage of the college, and that the master, governors and assistants are obliged to take an oath to maintain the honour and the welfare of the college. The master, governors and court of assistants are further empowered to transact or ordain all such other matters and things as the master, governors and court of assistants of the late dissolved company or corporation might theretofore lawfully do, transact or ordain.

Mr. Cross argued that this last power was purely administrative and was confined to doing such things as were requisite for the achievement of the charitable objects referred to in the last two recitals in the charter. In considering the validity of this argument it is, I think, permissible to look at the by-laws which in fact the college adopted. They are set out in the calendar. Section XV reads as follows: "The council will, at all times, protect and defend every fellow, fellow in dental surgery, member, "and licentiate in dental surgery of the college in the exercise "and enjoyment of the rights and privileges acquired by him as a "diplomat of the college." Section XVI gives power to remove from fellowship or membership a fellow or member who is adjudged guilty of professional misconduct or is convicted of a criminal offence or has his name removed from the medical register of the General Medical Council under section XXIX of the Medical Act, 1858. Section XVI at any rate cannot have existed in its present form in 1800, or, indeed, at any date before the passing of the Medical Act, 1858, but it was not suggested that some disciplinary powers were not at all times contained in the by-laws or that some provision had not always been made enabling the council to defend its fellows and members.

Mr. Cross sought to explain these provisions on the grounds indicated in paragraphs 22 and 23 of Lord Webb-Johnson's affidavit, where he says: "22. Apart from examinations the "college seeks and has sought in the interests of the public to "do all it can to secure that surgical practitioners shall not only "be technically competent but also shall hold to high standards "of professional honour. As a corollary the college feels and

“has felt itself bound to take and retain powers to defend and protect in their professional capacity its fellows, members and licentiates but this not in their interest but in the interest of the public so that surgeons feeling that they enjoy the support of the college may fearlessly and without anxiety render their best professional services to their patients. 23. As for disciplinary measures the council preserve their powers under the charters and by-laws but in practice the discipline of registered medical practitioners is now for the most part maintained by the General Medical Council established by the Medical Act of 1858.”

In the light of this evidence I am unable to reach a conclusion that the disciplinary and “defence” activities of the college are purely ancillary to its plainly charitable objects as set out in the recitals and illustrated in its 1948 Report. It was the descendant of a body which plainly could not be regarded as a purely charitable corporation. If it had not had disciplinary powers over its members, there was, until the Medical Act, 1858, so far as the evidence goes, no other body which could exercise those powers over its members. Having regard to section XV of the by-laws and to paragraph 22 of Lord Webb-Johnson’s affidavit, it is difficult to accept the view that the power to defend and protect in their professional capacity its fellows, members and licentiates was taken in 1800 solely in the interests of the public and without any intention to promote the interests of the college. On the whole, therefore, though with some reluctance, having regard to the excellent work in research and education that the college is now doing, I have come to the conclusion that the college cannot properly be held to have established that its objects in so far as they are non-charitable are merely ancillary to a main charitable object. I would, therefore, dismiss the appeal.

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Appeal allowed.

Solicitors: *Wilde, Sapte & Co.; Peake & Co.; Withers & Co.*

[HOUSE OF LORDS.]

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Apr. 24.

False imprisonment—Arrest—Arrest without warrant—Duty of person arresting—Taking arrested person forthwith to justice or police officer.

A woman suspected of theft in a large department store was arrested outside by store detectives and taken back into the shop where the managing director considered the case and, having decided to prosecute her, immediately sent for police officers to whom she was given in charge:—

Held, that, inasmuch as she was not detained beyond a reasonable time for the managing director to make his decision, the owners of the shop were not liable in damages for false imprisonment.

Where one person arrests another in exercise of the common law power of arrest, his duty is to take the arrested person before a justice or to a police station as soon as he reasonably can and not necessarily forthwith.

Decision of the Court of Appeal (sub nom. *Tims v. John Lewis & Co. Ltd.*) [1951] 2 K.B. 459 reversed.

APPEAL from the Court of Appeal (Lord Goddard C.J., Asquith and Birkett L.JJ.).

This was an appeal from the order of the Court of Appeal dated March 14, 1951, in so far as it affirmed the judgment of Donovan J., dated November 24, 1950, on the issue of false imprisonment, on which issue it was adjudged that Mrs. Annie Tims, the plaintiff (respondent), should recover against John Lewis & Co. Ltd., the defendant company (appellant), £30.

The appeal raised the question whether a person who lawfully arrested another person without a warrant discharged his duty if he acted reasonably for the purpose of bringing the arrested person to justice by handing him over to the police within a reasonable time, or whether the arrester must take the arrested person forthwith before a justice or a police officer with power to grant bail.

The action which was begun in the King's Bench Division by a writ dated June 9, 1949, was brought by the respondent against

* *Present*: LORD PORTER, LORD OAKSEY, LORD MORTON OF HENRYTON, LORD REID and LORD COHEN.

the appellant company for damages for slander, assault, false imprisonment and malicious prosecution. The action was heard before Donovan J. and a jury. On the findings of the jury, the respondent failed on the issues of slander and assault, but the judge decided in her favour on the issues of false imprisonment and malicious prosecution. The Court of Appeal allowed the appellant company's appeal on the issue of malicious prosecution but dismissed the appeal on the issue of false imprisonment, ordering that judgment should be entered for the respondent for £30 on that issue. The appellant company appealed to the House of Lords.

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The facts are fully set out in the opinion of Lord Porter.

A. Melford Stevenson Q.C., Wilson Q.C. and Blomefield (Adrian Hamilton with them) for the appellant company. The authorities relied on by the Lord Chief Justice do not support the general proposition and the very strict rule which he laid down, and the appellants do not seek to obtain the alteration of any existing rule of law. An element of reasonableness and convenience is imported into the matter. The duty of the appellant company was to act reasonably for the purpose of bringing the respondent to justice within a reasonable time, and that duty was discharged. It is not improper to detain a person for the purpose of determining whether the available evidence justifies a prosecution, and suspected persons should be given a chance to explain themselves before being taken before a magistrate. In the case of corporations it is undesirable that subordinate employees such as detectives should have the power or the duty to decide whether or not to prosecute on their behalf. That should rest with a responsible senior official who has heard the explanation of the accused. In a case of suspected shop-lifting the suspected person cannot be arrested until he has left the store without paying, and accordingly the matter can only be considered by a responsible official if the detective is entitled to bring the suspected person back to the premises before handing him over to the police. This is in the interests of the suspected person, since it gives him the opportunity of making any representations he wishes or giving any explanation he can to the responsible official, in private, so that in a proper case the publicity of a trial is avoided. The advantage of responsible direction is considerable where the suspected person is very old or very young or mentally unstable, and leniency is in the public interest.

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The reasonableness of the period for which the appellant was kept at the shop cannot seriously be disputed. The real complaint is the fact that she was taken there at all.

*Wright v. Court*¹ lays it down that an arrested person must be brought before a justice within a reasonable time, and reference is made to Comyns' Digest (1822), 5th ed., vol. IV, pp. 471-2. *Hall v. Booth*² raises no question of the time allowable for taking an arrested person before a justice. *Morris v. Wise*,³ which is based on a particular statutory enactment, does not support the Lord Chief Justice's proposition: see Larceny Act, 1827, s. 63, Larceny Act, 1861, s. 103, and Larceny Act, 1916, s. 41. The object of bringing an arrested person before a justice or a police officer is not in order that he may obtain bail. Before the Summary Jurisdiction Act, 1879, s. 38 (substantially the same as the Criminal Justice Administration Act, 1914, s. 22), no one but a justice of the peace had a right to give bail. Yet a private person arresting anyone on suspicion of felony discharged his duty not only by delivering him to a justice but also by bringing him to a constable or to gaol: see Hale's Pleas of the Crown (1778 ed.), vol. II, pp. 81, 95; (1800 ed.), vol. II, p. 80, and Hawkins's Pleas of the Crown (1824), 8th ed., vol. II, pp. 120, 174-5. See also *Christie v. Leachinsky*.⁴

Wilson Q.C. following. Not one of the authorities says that on an arrest by a private person any action has to be taken forthwith: see Burn's Justice of the Peace (1758 ed.), p. 48; Dalton's Country Justice (1635), 6th ed., p. 337; Finch's Common Laws of England (1759 ed.), p. 368—see also the original edition (1613), *Un Description del Common Leys d'Angleterre*, p. 127.

In the old authorities the arrester is either given the choice of various courses of action, as between taking the arrested person to a constable or a gaoler or a justice, or else he is enjoined in the first place to take him to a constable or to gaol, as the case may be: see Sheppard's Grand Abridgment (1675), vol. II, pp. 306, 309, 310; Brooke's Graunde Abridgement (1573), vol. II, pp. 25-7; Nelson's Justice of the Peace (1710), 3rd ed., p. 57; Shaw's Practical Justice of the Peace (1728), vol. I, p. 171; Wood's Institute of the Laws of England (1728), 4th ed., p. 615. All the authorities in conjunction show that at common law it is not imperative for the arrester to take the arrested person before

¹ (1825) 4 B. & C. 596; 4 L.J. K.B.(O.S.) 17.

² (1834) 3 N. & M. 316.

³ (1860) 2 F. & F. 51.

⁴ [1947] A.C. 573, 602.

a justice of the peace forthwith. The authorities rather give the arrester practical advice as to the steps he should take after the arrest; the alternatives propounded would present themselves to the ordinary citizen as a matter of common sense: see also Hale's *Pleas of the Crown* (1800 ed.), vol. II, p. 81, and *Cokayne v. Manyngham*.⁵

As to the law with regard to statutory powers of arrest, the position is that they appear to have been given in the first place in cases where there was no common law power of arrest without warrant, e.g., where the offence in question was not a felony. Legislation created many new felonies and within the scope of divers statutes were many offences which were already felonies. Additional powers of arrest were given by the Larceny Act, 1827, s. 43, and the Larceny Act, 1861, s. 41, and also by many other Acts. If any Act is intended to abridge a common law power it must do so clearly, and that has not been done in relation to the power at present in question. It would be contrary to authority and to the principles of the construction of statutes to hold that the common law was cut down by statutes passed for a particular purpose. The statutory powers are additional to the common-law powers and are not a substitute for them. The distinction lies between common-law powers based on the reasonable common-sense conduct of ordinary men and statutory powers given for specific purposes to specific people: see Halsbury's *Laws of England*, 2nd ed., vol. XXXI, p. 524, para. 684; Kenny's *Criminal Law*, 12th ed., p. 449; 16th ed., pp. 473-4; Archbold's *Criminal Pleading*, 32nd ed., p. 1039.

In *Morris v. Wise*⁶ there was no felony and so the common-law power of arrest could not come into play.

The law attaches importance both to the liberty of the subject and to the risks run by persons preserving the Queen's peace: see *Christie v. Leachinsky*.⁷

The respondent did not appear and was not represented.

Their Lordships took time for consideration.

April 24. LORD PORTER. My Lords, the problem raised in this matter requires a determination by your Lordships' House of the principles on which and the circumstances in which the arrest of those suspected of felony can be justified in a case

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⁵ (1471) 47 Selden Society Publications 156, 157.

⁶ 2 F. & F. 51.

⁷ [1947] A.C. 573, 591.

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where no warrant has been issued, and it affects, I think, both the obligations of the police and those of private persons. The solution must, therefore, lead to a careful inquiry which is not rendered the less anxious by the fact that the appellants alone were represented in the argument before your Lordships or the fact that the sum at stake is a small one. When the liberty of the subject is at stake questions as to the damage sustained become of little importance.

The appeal is from an order of the Court of Appeal of March 14, 1951, in so far as it affirms the judgment of Donovan J. on an issue as to false imprisonment. The circumstances under which the claim arises are undisputed.

The respondent, Mrs. Tims, and her daughter visited the calendar department of the appellants' store in Oxford Street in the afternoon of December 16, 1948, and whilst they were there Miss Tims was seen by a Miss Wheeler, one of the appellants' private detectives, to steal four calendars. As Mrs. and Miss Tims were leaving the premises another private detective joined Miss Wheeler and the two together followed the mother and daughter along Oxford Street to Messrs. Littlewoods' store about three or four hundred yards distant. On the way Miss Tims transferred the four calendars to a paper bag which her mother was carrying. At Littlewoods Miss Tims stole a table cloth and this, too, she placed in her mother's bag before leaving the store. When Mrs. and Miss Tims had come out into the street again one of the two detectives accosted them, said they had stolen the calendars, and asked them to come with her.

The evidence established that the accusation of theft was made in the presence of both the accused and, though the mother is deaf, sufficiently loudly to give her some idea of the charge which was being made. This was the conclusion reached by the Court of Appeal. The respondent, on the other hand, maintained that she had not been informed at first why she was being taken back to the appellants' premises, and the jury accepted her evidence. Her contention accordingly was that she had been arrested without being told what her alleged crime was and that therefore, under the decision in *Christie v. Leachinsky*,⁸ the arrest was wrongful. It is plain, however, that she knew exactly what the charge was by the time the party had returned to the appellants' store. Indeed, the jury have found that one of the detectives then said: "Where is the stolen stuff?" The learned

⁸ [1947] A.C. 573.

judge, however, as a result of the jury's answers to two questions put by him, held the appellants liable on the issue of false imprisonment on the ground that Mrs. Tims was not informed at the first opportunity that she was accused of stealing. On the other hand, it is clear from the daughter's evidence that the accusation of stealing was made in her presence and that of her mother. I quote from her cross-examination: "(Q.) Whatever "was said, this is quite clear, is it not, that it was said in the "presence and hearing of both you and your mother? (A.) Yes. "(Q.) And whatever was said, it was made quite clear that you "were being accused of stealing? (A.) As I have already said."

That testimony makes it apparent that the crime for which the arrest was made was plainly referred to. The respondent, it is true, denied all knowledge of the accusation until later, but she was deaf and there is nothing to indicate that the detectives had any reason to suspect that she could not hear what was said. They cannot, therefore, be at fault if Mrs. Tims did not hear. In my opinion the decision in *Christie v. Leachinsky*⁸ has no bearing on such a case. I make these observations lest it should be thought that full consideration had not been given in your Lordships' House to the argument which prevailed before Donovan J., but indeed this aspect of the case is only a matter for consideration inasmuch as, if the respondent had taken part in the argument before your Lordships, she might have defended Donovan J.'s decision in her favour on that ground.

After making the charge the two detectives took the respondent and her daughter back to the office of the chief store detective in the appellants' store, and they were detained there against their will until the chief detective, a Miss Pearce, and a managing director had been summoned to the office and an account had been given to them of what the detectives had observed. Miss Tims undoubtedly protested that her mother was some 10 to 15 feet distant from her when the calendars were taken, and the jury have so found, but equally it is clear that the calendars were at a later time placed in the mother's bag and were present in it when the arrest was made and found in it at the chief detective's office.

Some difference appears to exist as to the length of time during which the two women were detained at the chief detective's office. Miss Tims said it was not less than an hour, and the jury, in answer to a question put to them in the form: "Was

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⁸ [1947] A.C. 573.

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 1952 “hour or so before the police were summoned?” replied “Yes.”

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The exact length of the detention is, in my view, immaterial in the circumstances of this case, but the estimate of an hour or so is, in my view, not established by the evidence. No doubt it seemed a long time to Miss Tims, but her own evidence is that she and her mother were arrested some time between 3.30 p.m. and 4 p.m., the police evidence called for the respondent is that they were summoned at 4.10 p.m. and, after going to the office and hearing the story and accompanying the accused to the station, they reached the station at 4.30 p.m.

The length of detention would only be material if it had been alleged that the two women were detained beyond such time as was reasonable to acquaint a director or manager of the circumstances and obtain his instructions whether to prosecute or not. No such suggestion was made, no evidence was called to deal with the point, and the respondent is, therefore, precluded from relying on it now. I only mention it because there may be cases in which it could be contended that, though a reasonable amount of detention would be justified, the actual detention was unduly long. In such a case it would be the duty of the judge to determine whether there was or was not evidence from which it could be deduced that the detention was unduly long, and, if he held that there was, to leave the question to the jury whether in fact it was longer than was justified. As I have said, however, no such inquiry is called for in the present case.

The evidence establishes that Miss Tims protested that her mother was in no way concerned with the theft, but Mrs. Tims herself seems to have offered no explanation of the presence of the stolen articles in her bag either to the detectives or at the office or before the court, though it is in evidence that she did say in the presence of a police constable: “I did not have any-
 “thing to do with it.” Her failure to do so is, of course, not material as in any way establishing her participation in the crime, but it is a reason for accepting the view that the representatives of John Lewis genuinely thought her guilty.

The sequence of events after the return to the chief detective’s office is that first she and afterwards a managing director were sent for and informed of what had occurred, and that the police were then sent for and arrived shortly after 4.10 p.m. though they were not immediately available on the first summons. The two accused were then taken to the police station, charged and released on bail.

Next morning they were brought before the magistrate. At that hearing the appellants were represented by a solicitor, and the respondent was unrepresented. Inasmuch as Mrs. Tims was not beside her daughter at the moment when the calendars were taken, the solicitor appears to have thought that a jury might acquit the mother and therefore the charge against her should not be persisted in. He accordingly asked for a remand. It was suggested that as he thought a jury might not convict and then asked for a remand instead of withdrawing the charge at once, his action supported an allegation of malice with which the appellants would be infected and would therefore be liable as having instituted, or at any rate persisted in, a malicious prosecution. I see no reason for supposing that the solicitor thought that the respondent was not guilty though he may have thought that a jury might not convict. But in any case John Lewis & Co. Ltd. are the persons sued, not their solicitor, and, as the Lord Chief Justice has pointed out, they never instigated him to continue the prosecution after he thought it might not succeed. His caution is no evidence of malice and no allegation of malice is made against the two detectives or any of the other representatives of the appellants.

The allegation of defamation is quite untenable, as both courts below have held, and against this part of the decision there is no appeal.

There remains only the question, therefore, whether the appellants were rightly mulcted in damages for false imprisonment because their servants did not take the respondent immediately before a magistrate, but brought her back to a part of the premises of John Lewis & Co. Ltd.

It was maintained on her behalf that though an arrest might originally be justified, yet it became wrongful if the person accused was not taken forthwith before a justice of the peace. The appellants admitted that they could not detain her for an unreasonable time before handing her over to a constable or a gaoler, or bringing her before a justice, but contended that their obligation was only to act within a reasonable time and that an immediate and direct journey to the magistrate's court was not required. Of the three courses which the respondent asserted were open to them, commitment to prison may today be neglected: the accused would not be received nor the prison available. The choice lies between an immediate bringing before a magistrate or possibly handing over to a police officer and the like course taken within a reasonable time.

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As I have said, if the latter is the true obligation and if the appellants' representative was justified in bringing back the respondent to John Lewis & Co. LD.'s premises in order to get the advice of a manager and to obtain, if he thought fit, his authority to prosecute, there is no ground for saying that the time taken was unreasonable. But it is said on behalf of the respondent that it is not enough for the arrester to bring the person whom he has arrested before a justice or the police within a reasonable time: such a person must be brought before them "immediately" or "forthwith." If not, the arrest is wrongful.

The Court of Appeal has found the appellants liable on this short ground, and on this short ground only. Their view has been expressed by the Lord Chief Justice in a passage of his judgment, which I venture to quote⁹: "The law, as I understand it, is this, that if a person, be he a constable or a private person, arrests without warrant—and I emphasize those words "because if there is a warrant it makes all the difference—" although the arrest may be perfectly justified on the ground that "a felony has been committed and that there is reasonable and "probable cause for believing that the person arrested has committed the offence, it is the duty of the constable or the private person forthwith to take the arrested person before a justice—that was the original law—but now, I think, to a police station, before a police officer. I say that because since the Summary Jurisdiction Act, 1879 (see section 38), as amended and "extended by other Acts, a superintendent or inspector of police, "or other officer of equal or superior rank, has power, where a "person is brought to the police station having been arrested "without a warrant, to grant bail. Obviously, the reason why "the common law required that a person should be forthwith "taken before a justice was because he was being imprisoned, "in the sense that his liberty was being curtailed; he had been "taken into custody, and it was therefore for a justice at once "to consider whether or not the case should be investigated "there and then, as might have been done in the old days when "he sat in his own justice room, and was constantly done, or "whether he should grant bail. And now that a police officer "has statutory powers to grant bail, he will do so, except in cases "of gravity or where for good reason he may think it would be "unsafe to grant bail. In an ordinary case of a crime of this "sort a police officer is as efficacious, for the protection of the

⁹ [1951] 2 K.B. 459, 468.

"subject, as a justice, and for that reason the arrested person "should be taken forthwith before a police officer." The learned Chief Justice supported this view by the citation of three cases and added ¹⁰: "I am of the opinion that the taking of these two "women to the stores of John Lewis & Co. Ld. instead of taking "them direct to a metropolitan police station or to a metropolitan "police court could not be justified and that therefore, technically, "there was a false imprisonment of the plaintiff."

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Before I analyse the cases and consider the history and principles which lie behind the problem presented to your Lordships, it is, I think, expedient to set out the grounds on which the appellants justify their action. It is undesirable, they say, that their detectives, who must of necessity be subordinate officials, should be entrusted with the final decision whether a prosecution should take place or not. Such a decision should only rest with a senior and responsible officer and after he has heard any explanation which the accused person has to offer. Indeed, it is in the interest of the person arrested that, however conclusive the evidence should appear against him, he should have the opportunity of stating what he has to say and that in a proper case he should avoid the publicity of a public trial. The complaint here is not that the appellants acted unreasonably or harshly or detained the respondent for an unnecessarily long time, but only that it is the law and expedient in the interests of the public generally that the supposed criminal should be brought before the court as speedily as possible and afforded the opportunity of applying for and being granted bail. Bearing these considerations in mind, I deal first with the three cases on which the Court of Appeal primarily relied.

The first is *Wright v. Court*,¹¹ decided in the year 1825, where it was held that a constable arresting a man must take him before a justice to be examined as soon as he reasonably can and that detention for three days in order to enable a person whose goods had been stolen to collect and bring his witnesses was not justified. The judgment says ¹²: "It is the duty of a person "arresting anyone on suspicion of felony to take him, before a "justice as soon as he reasonably can, and the law gives no "authority even to a justice to detain a person suspected, but "for a reasonable time till he may be examined." A report of the same case in the Law Journal Reports says ¹³ the arrested

¹⁰ [1951] 2 K.B. 459, 471.¹² Ibid. 598.¹¹ 4 B. & C. 596.¹³ 4 L.J.K.B.(O.S.) 17, 18.

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For these propositions Comyns' Digest (1822), 5th ed., vol. IV, pp. 471-2 (H.4) and (H.5), is referred to. The first passage says: "A man may be imprisoned by warrant of law, for that "is a lawful process: as, by a constable ex officio, who upon "complaint of a felony may commit the offender to an house, "gaol, or stocks, till he can be brought before a justice of the "peace," and adds: "So, if a felony be committed, the offender "may be apprehended by any private person." The later passage says: "The law gives no authority to a justice of the peace to "detain a person suspected, but for a reasonable time till he may "be examined." It will be observed that none of these passages use the words "immediately" or "forthwith," though they leave open the question what is a reasonable time. Moreover, the three days' delay in that case was not for the purpose of bringing the man arrested before the justices, but of collecting evidence.

The second case was *Hall v. Booth*,¹⁴ decided in 1834. "A "private person," the side-note says, "cannot apprehend another, "upon a suspicion of felony, for the purpose of taking him to "the place where the theft was committed, in order to ascertain "whether he was the thief." But, in those circumstances, the plaintiff was not arrested as a felon, but was taken to the place where the felony was committed to find out whether he had committed the crime or not. Accordingly, Lord Denman C.J. very naturally said¹⁵: "You may go to inquire, but you cannot "take him." In fact, however, the complaint appears to have been that no 'adequate grounds for suspicion had been set out in the plea, and leave to amend was given, a circumstance which seems only to be consistent with a complaint that the pleadings were not in order. No question as to the time allowable for taking an arrested man before a justice was raised: he was taken to a shop for the purpose of ascertaining if he was the thief and was not arrested as a felon.

The third case is *Morris v. Wise*,¹⁶ decided in 1860. The action was for false imprisonment and the plea not guilty by statute. The statute in question was (after amendment) the Larceny Act, 1827 (7 & 8 Geo. 4, c. 29), and the charge was of stealing grass, a crime dealt with by section 43 but not made a

¹⁴ 3 N. & M. 316.

¹⁶ 2 F. & F. 51.

¹⁵ Ibid. 319.

felony in case of the first offence. Apart from the Act, therefore, there would be no power of arrest. By section 63, however, of the same Act a special power of arrest was given to any peace officer or to the owner of the property in question in respect of any person found committing any offence punishable either on indictment or on summary conviction "by virtue of this Act." This right, however, was subject in express words to the obligation that the offender should be immediately apprehended and forthwith taken before some neighbouring justice of the peace, and it will be observed that the power of arrest is only given to a limited type of individual and even then only if the offender is taken in the act. Byles J., who tried the case, pointed out that the plaintiff had not been taken straight to the magistrate but to the defendant's house, and left the question to the jury to say what damages should be given for the taking of the plaintiff by an indirect route. Under this direction the jury awarded forty shillings.

The decision, therefore, has no direct bearing on the obligations imposed by the common law and clearly does not limit the general power of arrest. It would be an odd result of the Act if in all cases of felony no one but a constable or the owner of stolen property could arrest, and only then if the person arrested were taken "flagrante delicto." The fact is that the Act does not lessen the common-law power of arrest, but on the one hand widens it so as to include non-felonious offences, and on the other limits the persons who are entitled to arrest and subjects them to the obligation to arrest immediately and bring the person concerned before a magistrate forthwith. In my view, therefore, the cases do not of themselves bear out the proposition that an arrested man must be taken before a justice of the peace immediately.

My Lords, similar additional powers of arrest are given by the Larceny Act, 1861, s. 103, and the Larceny Act, 1916, s. 41, and by many other Acts, and are subject to similar restrictions. I do not need to discuss them further, since the same considerations apply to them as to the Larceny Act, 1827.

If, then, the three cases which have been cited are not authorities that an arrested person must be taken immediately before a magistrate, it is necessary to examine the practice which has obtained in this country both before and after the Acts and cases cited.

Where the right of arrest is given to a private person, it is obviously desirable that the arrested man should be entrusted

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to some official care as soon as possible, and statements to that effect are to be found in, I think, all the textbooks, old or new. But it does not appear that in earlier days it was essential that the accused man should be brought before a magistrate in order that he might be bailed.

The practice is set out in Hawkins's Pleas of the Crown (1824), 8th ed., vol. II, p. 174: "It seems to be agreed by all the old books, that wheresoever a constable, or private person, may justify the arresting another for a felony or treason, he may also justify the sending or bringing him to the common gaol; and that every private person has as much authority in cases of this kind as the sheriff or any other officer, and may justify such imprisonment by his own authority, but not by the command of another. But inasmuch as it is certain, that a person lawfully making such an arrest may justify bringing the party to the constable, in order to be carried by him before a justice of peace, inasmuch as the statutes of 1 & 2 Ph. and Mary, c. 13, and 2 & 3 Ph. and Mary, c. 10, which direct in what manner persons brought before a justice of peace for felony shall be examined by him in order to their being committed or bailed, seem clearly to suppose, that all such persons are to be brought before such justice for such purpose; and inasmuch as the statute of 31 Car. 2, commonly called the Habeas Corpus Act, seems to suppose, that all persons who are committed to prison are there detained by virtue of some warrant in writing, which seems to be intended of a commitment by some magistrate, and the constant tenor of the late books, practice, and opinions, are agreeable hereto: it is certainly most advisable at this day, for any private person who arrests another for felony, to cause him to be brought, as soon as conveniently he may, before some justice of peace, that he may be committed or bailed by him."

To the like effect is Hale's Pleas of the Crown, 1800 ed., vol. II, p. 80, in which it is said of private persons using their powers of arrest: "Now what is to be done by a private person, that thus arrests a party upon suspicion of felony; if after such an arrest the party arresting discharge him without bringing him to a justice or constable, he shall be punished for the escape at the king's suit, but it makes not the imprisonment unlawful as to the party. 10 E. 4. 17, b. Or he may carry him to the gaol, and if the gaoler receive him, he that made the arrest is discharged, 10 E. 4. 18, a, but he must not carry him to a gaol of any other county than where he is taken, unless either there be no gaol in the county, or that he cannot for the danger of

“rebels bring him to that gaol. 11 E. 4. 4. Or he may deliver him to the constable of the vill, and that is a sufficient discharge. 10 E. 4. 17, b. But the proper way is to bring him to a justice of peace, who may commit, or discharge, or bail him, as the case requires.”

Hawkins in his turn quotes from Dalton's Country Justice (1727), p. 583, where it is said: “But in all these cases before, where a private man shall arrest another, he ought thereupon to commit the prisoner to the gaol, or to carry and deliver him to the constable, or to some other officer, etc.” Dalton himself refers to Finch's Common Laws of England. I have the first English edition printed in 1759, and must therefore refer to that, but it was already printed in French. The English edition says, at p. 368: “Every one who suspects another of a felony . . . may arrest him; so that thereupon he commit him to gaol.” To the same effect is Sheppard's Grand Abridgment (1675), vol. II, p. 302, where, dealing with the right of a private person to arrest, he ends: “. . . he may of his own head, without any warrant from a justice of the peace, or officer, apprehend the felon, and carry him to a justice of the peace, or other officer, or to prison.” Finally, in Burn's Justice of the Peace (1869), 30th ed., vol. I, pp. 305-6, the authority of which has been recognized in your Lordships' House in *Christie v. Leachinsky*,¹⁷ it is stated: “When a *private person* has apprehended another for treason or felony, he should deliver him over to a constable, or carry him before a magistrate or to any gaol in the county. . . . It is rarely the case that a private person carries the party to gaol. He cannot apprehend and discharge the party at his own pleasure. . . . Neither can he, it seems, apprehend and deliver the party over to a constable only, but he must follow up the charge by attending before the magistrate, and then only he ceases to be an actor.” One may perhaps add the authority of *Cokayne v. Manyngam*,¹⁸ in which the court held that: “If a man arrest another for felony and deliver him to the constable, that then he is loyally discharged even if the constable has let the prisoner go at large and has not led him to the gaol.”

My Lords, I quote these authorities not for the purpose of suggesting that the obligation to bring an arrested person before a magistrate within a reasonable time has been lessened or abolished

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¹⁷ [1947] A.C. 573.¹⁸ 47 Selden Society Publications
156, 157.

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or of putting forward a contention that the duty may be laxly discharged, but in order to establish that the obligation is not in terms to proceed before the magistrate forthwith or immediately as certain special Acts require. The object of bringing a man arrested before a magistrate is not, as I view it, to ensure that the accused man may be bailed at once. The right in the case of anyone other than a justice of the peace to give bail did not exist before the Summary Jurisdiction Act, 1879, and even then the provisions of section 38 only gave the right to grant bail to police officers if it was not practicable to bring the alleged offender before a court of summary jurisdiction as soon as practicable after he is taken into custody. Nor has the enlargement of those powers by later Acts effected any alteration in the length of the time given to bring the arrested man before a magistrate. Indeed, under the earlier procedure the individual who arrested was given the choice of three alternatives: gaol, the constable, or the justice. Today the gaol would not receive the prisoner, and I think that Burn's requirement is right:—a handing over to a constable is not enough—the arrester is not free of his obligation until he has proceeded before a magistrate. Nevertheless, the mere fact that the handing over to a constable is one of the methods prescribed for ridding oneself of the prisoner indicates a less stringent obligation than to proceed before the justice forthwith.

The two methods of approach are perhaps best seen by comparing the statement contained in the article on Criminal Law in Halsbury's Laws of England, 2nd ed., vol. IX, pp. 96-7, para. 122, a subject which was entrusted to the late Avory J. It is said: "A private person who arrests another under a common-law power can only detain him for a reasonable time, and must then either set him free or hand him over to a constable or take him before a justice of the peace." The statement proceeds: "If the suspected offender is not liberated and is not taken before a justice with reasonable expedition and by a direct road, the person who arrests is liable to an action of trespass." For the latter statement *Wright v. Court*¹⁹ is referred to, but that case merely speaks of a reasonable time. Whether the time taken falls within that requirement is a matter of fact. No doubt the route taken is one matter for consideration, but in the present case the learned judge who tried the case did not consider the time too long or the route adopted and the delay in proceeding to John Lewis & Co.'s office unreasonable.

¹⁹ 4 B. & C. 596.

As against this statement of the law may be contrasted that contained in Clerk and Lindsell on Torts, 10th ed., p. 308, where it is said: "The statutes authorizing arrests without warrant generally provide that the arrested party shall be taken immediately or forthwith before a justice of the peace, but these provisions are only declaratory of the common law. So jealous is the law on this point that if the prisoner be conducted by a circuitous instead of the ordinary direct road he may recover for a false imprisonment." For this statement *Morris v. Wise*²⁰ is quoted. That case, however, as is pointed out above, was not one of arrest under the common law, and I see no reason for assuming that statutes which enlarge the power of arrest so as to include misdemeanors, but limit the persons to whom the power of arrest is granted, are merely declaratory of the common law right, or that the same principles apply to both classes. What the common law requires is that, if a man be arrested on suspicion of felony, he should be taken before a tribunal which can deal with his case expeditiously.

The question throughout should be: Has the arrester brought the arrested person to a place where his alleged offence can be dealt with as speedily as is reasonably possible? But all the circumstances in the case must be taken into consideration in deciding whether this requirement is complied with. A direct route and a rapid progress are no doubt matters for consideration, but they are not the only matters.

Those who arrest must be persuaded of the guilt of the accused; they cannot bolster up their assurance or the strength of the case by seeking further evidence and detaining the man arrested meanwhile or taking him to some spot where they can or may find further evidence. But there are advantages in refusing to give private detectives a free hand and leaving the determination of whether to prosecute or not to a superior official. Whether there is evidence that the steps taken were unreasonable or the delay too great is a matter for the judge. Whether, if there be such evidence, the delay was in fact too great is for the jury: see *Cave v. Mountain*.²¹

In the present case the complaint was, as I have said, not that the detention was too long but that a direct route from the place of arrest to the magistrate's court had not been taken. In my opinion, that is not the vital question. Rather it is whether, in all the circumstances, the accused person has been brought

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²⁰ 2 F. & F. 51.²¹ (1840) 1 Man. & G. 257.

H. L. (E.) before a justice of the peace within a reasonable time, it being
 1952 always remembered that that time should be as short as is
 reasonably practicable.

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I would allow the appeal.

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My Lords, my noble and learned friend, LORD COHEN, asks me to say that he has had an opportunity of reading my opinion and he agrees with it.

LORD OAKSEY. My Lords, I have had the advantage of reading the opinion of the noble and learned Lord on the woolsack, and I agree with it.

LORD MORTON OF HENRYTON. My Lords, the question of law which arises on this appeal may be stated as follows: When one person arrests another without a warrant in exercise of the common-law power of arrest, is it the duty of the person making the arrest to take the arrested person before a justice or to a police station "forthwith," or is it the duty of the person making the arrest to take the arrested person before a justice or to a police station "as soon as he reasonably can"? The latter phrase is quoted from the judgment of the court in *Wright v. Court*.²²

The authorities on this subject have been fully discussed by my noble and learned friend on the woolsack. I agree with his reasoning and with his conclusion, and I desire only to add a few words on the further question, whether the two detectives took the respondent to the Marylebone Lane Police Station as soon as they reasonably could. In my opinion, they did. It was a regulation of the appellants that only a managing director or a general manager of the appellants was authorized to institute any prosecution against any person. This being so, it was, I think, reasonable for the detectives to take the respondent to the office at the appellants' premises for the purpose of getting authority for a prosecution. I cannot find any evidence that they went there for any other purpose. The case would have been a different one if they had gone there for the purpose of filling in gaps in the evidence: see *Hall v. Booth*²³ and *Morris v. Wise*.²⁴ On reaching the office, the detectives explained what they had seen to the appellants' chief store detective and subsequently to Commander Newdegate, the managing director of the appellants' store in Oxford Street. As soon as Commander Newdegate had

²² 4 B. & C. 596, 598.

²⁴ 2 F. & F. 51.

²³ 3 N. & M. 316.

authorized the prosecution of the respondent and her daughter on a charge of theft, the police were sent for and they arrived a few minutes later from the Marylebone Lane Police Station. The substance of the facts was told to the police officers, and the respondent and her daughter were taken to the said police station.

My Lords, it does not appear that any point was taken either before Donovan J. or in the Court of Appeal as to the length of time for which the respondent was detained at the office. The complaint was that she was taken there at all, instead of being taken direct to the police station. It is, I think, clear that Donovan J. attached no importance to the length of the detention, for the first question which he put to the jury in regard to the alleged false imprisonment was: "Was the plaintiff detained "against her will in John Lewis's for an hour or so before the "police were summoned?" If the learned judge had attached any importance to the length of the detention, he would surely have divided this question into two parts: (1) Was the plaintiff detained against her will in John Lewis's? (2) If so, for how long was she detained? Further, I think, it appears from the judgment of the Lord Chief Justice that he regarded the respondent's case as being based on the fact that she was taken to the office, and not on the length of time during which she was detained there.

If the detectives acted reasonably, having regard to the regulation to which I have already referred, the further question must be considered whether the regulation was a reasonable one to impose on detectives whose duty it might be to arrest a suspected person. For if the regulation was such as to result in an unlawful infringement of the liberty of the subject, such infringement could not be excused on the ground that the detectives were merely carrying out the regulation.

In my opinion the regulation was a reasonable one. On this point I agree with the submissions of counsel for the appellants, which they summarized at p. 6 of their printed case as follows: "(A) It is undesirable that the power or duty to institute proceedings on behalf of corporations or other persons should be delegated to subordinate employees thereof or should be exercised by any but senior and responsible officers or representatives thereof. In the case of suspected shop-lifting, it is not practicable to arrest a suspected person until he has left the premises without paying for goods which he has taken. Therefore it will not be practicable for a senior and responsible officer

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“ or representative to decide whether a charge should be made,
 “ unless subordinate employees such as store detectives are
 “ entitled to take an arrested person back to the premises before
 “ he is handed over to the police. (B) It is in the interests of an
 “ arrested person himself that he should not be charged without
 “ being given an opportunity of offering any explanation or making
 “ any representation to a responsible officer or representative of
 “ the prospective prosecutors. It is to his own advantage that
 “ this opportunity should be given in the privacy of an office with
 “ the minimum possible number of persons present. This safe-
 “ guard is especially important when the arrested person is very
 “ young or old or appears to be mentally unstable: in such
 “ cases it is in the public interest that a lenient and responsible
 “ discretion should be exercised before any charge is made.”

I would allow the appeal.

LORD REID. My Lords, I concur.

Appeal allowed.

Solicitors: *Underwood & Co.*

[HOUSE OF LORDS.]

H. L. (E.)* HARRIS

APPELLANT;

AND

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Mar. 10, 11,
12, 13;

Apr. 9.

DIRECTOR OF PUBLIC PROSECUTIONS . RESPONDENT.

*Criminal law—Evidence—Joinder of charges—Eight counts alleging
 similar offences of office-breaking—Acquittal on first seven counts—
 Admissibility on one count of evidence on other counts.*

A series of eight larcenies having common characteristics occurred in May, June and July, 1951, in a certain office in an enclosed and extensive market at times when most of the gates were shut and in periods during part of which the accused, a police officer, was on solitary duty there. The precise time of only one larceny, the last, which occurred in July, was known and then the accused was found to be in the immediate vicinity of the office. He was charged on indictment with all the larcenies and, having

* *Present*: VISCOUNT SIMON, LORD PORTER, LORD OAKSEY, LORD MORTON OF HENRYTON and LORD TUCKER.

been tried on all eight counts simultaneously, he was acquitted on the first seven and convicted on the eighth, that relating to the larceny in July :—

Held (per Viscount Simon, Lord Porter, Lord Morton of Henryton and Lord Tucker, Lord Oaksey dissenting) that, as regarded the larceny of July, the evidence of the previous larcenies, which occurred when he was not proved to have been near the office, should have been excluded from the consideration of the jury and, the judge having omitted to direct them to that effect, the conviction should be quashed. (*Per* Lord Oaksey: The similarity of the other larcenies rendered them relevant for the consideration of the jury.)

The proper rule, laid down in *Makin v. Attorney-General for New South Wales* [1894] A.C. 57, 65, is that evidence tending to show that the accused has been guilty of criminal offences other than that for which he is being tried is inadmissible unless that evidence is relevant to some issue which is before the jury, as, for example, if it bears on the question whether the acts alleged to constitute the crime were designed or accidental, or if it rebuts some defence which would otherwise be open to the accused. Such evidence may be advanced without waiting to ascertain what is the line of defence adopted.

It is a rule of judicial practice, flowing from the duty of the judge when trying a charge of crime to set the essentials of justice above the technical rule if the strict application of the latter would operate unfairly against the accused, and to consider whether the evidence of similar facts which it is proposed to adduce is sufficiently substantial, having regard to the purpose to which it is professedly directed to make it desirable in the interests of justice that it should be admitted. If it can, in the circumstances of the case, have only trifling weight, the judge would be right to exclude it.

Noor Mohamed v. The King [1949] A.C. 182 and *R. v. Sims* [1946] K.B. 531 considered and explained.

Decision of the Court of Criminal Appeal (sub nom. *R. v. Harris*) [1952] 1 K.B. 309 reversed.

APPEAL from the Court of Criminal Appeal.

The facts, stated by Viscount Simon, were as follows:—This was an appeal from a decision of the Court of Criminal Appeal which came before the House of Lords in consequence of a certificate given by the Attorney-General that the decision involved a point of law of exceptional public importance and that it was desirable in the public interest that a further appeal should be brought.

The appellant was a member of the City of Bradford Police Force. He was tried at the Leeds Autumn Assizes in November, 1951, before Pearson J., on an indictment containing eight counts charging him with office-breaking and larceny on a series

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of dates in May, June and July, 1951, by breaking into and entering the premises of a company of fruit and vegetable merchants situated in an enclosed and extensive Bradford market and stealing therefrom various sums of money. In every case the money stolen was only a part of the amount that the thief, whoever he was, might have taken; in every case the same means of access was used; and in every case the theft occurred in a period during part of which the appellant was on duty in uniform in the course of patrolling the market, and apparently at an hour when most of the gates to the market were closed to the general public. But, on the first seven of these occasions, there was no further evidence to associate the appellant specifically with the thefts. On the eighth occasion, however, which was between 6 and 7 a.m. on Sunday morning, July 22, the appellant, who was on solitary duty in the market as before, was found to be just outside the premises by two detective officers who had rushed to the spot on hearing, in the quarters where they were secretly waiting, the ringing of a bell actuated, without the knowledge of the appellant, by the thief's weight when he stepped on the floor of the shop. On this occasion, marked money which had been placed in the till had been abstracted, but it was not found on the appellant when he was arrested. It had been concealed in a coal-bin, not far away from where he was when first seen. The two detectives were well known to the appellant and might have been expected to be at once recognized by him, but when they entered the market, one by climbing over a gate and the other by opening it with some difficulty, though they were in the appellant's view at no great distance, he contended that he had not recognized them at first as members of the police force and so had not moved to join them; he said he thought that they were market-men entering the area for some innocent purpose. By the time the two detectives had reached the premises he had disappeared from view and a little later came running up to join them. The time which elapsed between their first sight of him and his return was just sufficient to have enabled him to have reached the coal-bin and come back.

Before the appellant was arraigned and in the absence of the jury, his counsel asked for the severance of the indictment and urged that the charge contained in the eighth count should be tried first and separately. Pearson J. applied section 5 (3) of the Indictments Act, 1915, and ruled that there was no good reason for ordering a separate trial on the eighth count and that

the case fell within rule 3 of Sch. I to the Act, since the charges formed part of a series of offences of the same or a similar character.

The appellant was acquitted on the first seven counts and convicted on the eighth. The Court of Criminal Appeal dismissed his appeal.

Burton Q.C. and *Rudolph Lyons* for the appellant. The grounds of appeal are (1) that the judge wrongly refused the application of the defence for a separate trial of the eighth count; (2) that he was wrong in holding that the evidence relating to the first seven counts was admissible on the eighth; and (3) that he was wrong in leaving the first seven counts to the jury. The second is the substantial ground.

On the eighth count the issue for the jury was, did the appellant commit the offence on July 22? The evidence relating to the first seven offences did not help to prove that, because there was no identification of anyone in relation to any of those offences and certainly no positive identification of the appellant. All that was proved was that at some portion of the period during which the offences were committed the appellant was on duty, and that his beat would have brought him to the vicinity of the premises which were entered. Evidence was also given that no offences of this kind were committed during the appellant's annual leave, which lasted for a fortnight, though the period when there were no offences extended to a month. This was a most prejudicial piece of evidence and in no way went to prove the appellant's guilt in relation to the offence on July 22.

Evidence of similar offences has never been admitted in a case of breaking and entering. To be admissible such evidence must fall under one of five recognized heads. It must be adduced: (a) to prove system, which means a system followed by the accused person; (b) to rebut a defence of accident or mistake, viz., a defence "raised, raisable or open" to the accused person; there must have been some indication that the accused person relied, or intended to rely, on the defence. (That is the effect of the modification of the decision in *R. v. Sims*¹ by the later decisions of *Noor Mohamed v. The King*² and *R. v. Hall*.³) No such defence was raised in the present case; (c) to rebut a defence of innocent intent, e.g., on a charge of uttering counterfeit coins

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¹ [1946] K.B. 531.

² [1949] A.C. 182.

³ [1952] 1 K.B. 302.

H. L. (E.) (see *R. v. Ollis*⁴ and *R. v. Bond*⁵); (d) to show vicious or unnatural propensity; (e) to prove identity in a particular offence, viz., to negative a defence of mistaken identification: *Thompson v. The King*.⁶ These categories cannot be added to, so as to render evidence of similar acts admissible to negative a defence of coincidence, and the House should restrict any erosion of the rule of the admissibility of evidence of prior offences, laid down in *Makin v. Attorney-General for New South Wales*.⁷ The modern development of the use of such evidence stems from the case and should be extended no farther.

Evidence of offences which the accused might have had the opportunity of committing has never been held to be admissible on a mere plea of "Not guilty" to increase the number of coincidences. The most that the evidence of the earlier offences in this case proved was that some person had broken into the premises and that the appellant had the opportunity of doing so. The first seven counts were really included in the indictment only as a make-weight. The fact that it is alleged that there were similar features in all the crimes cannot affect the question of the admissibility of the first seven in the absence of any identification of the appellant by them. If the evidence of the earlier offences was not admissible, it clearly was prejudicial in the highest degree to the appellant, and it cannot be said that without that evidence a reasonable jury would have convicted.

On the question of separate trials, the Indictments Act, 1915, which is purely procedural, did not alter the law of evidence. Though the matter is, to a large extent, one for the discretion of the judge at the trial, the matter is not one purely of discretion. The discretion is exercisable subject to the laws of evidence, and the judge must, at any rate, have regard to the question whether the evidence relating to one count would be admissible on another count. The only case where separate trials have been refused, when there was no connexion between the appellant and some of the charges, appears to be *R. v. Bailey*,⁸ a decision which should not be followed in view of the later decisions. Section 5 (3) of the Act envisages that separate trials shall take place where it is the court's opinion that the defendant may be prejudiced or embarrassed in his defence if this course is not followed, and though the Court of Criminal Appeal will not generally interfere with the

⁴ [1900] 2 Q.B. 758.

⁷ [1894] A.C. 57.

⁵ [1906] 2 K.B. 389.

⁸ (1847) 2 Cox C.C. 311.

⁶ [1918] A.C. 221.

exercise of a judge's decision in this matter, it will do so where the exercise of the discretion has resulted in a miscarriage of justice: *R. v. Grondkowski*.⁹

On the last ground of appeal, the fair inference is that in arriving at their verdict the jury must have considered all the incidents, which they ought not to have had the opportunity of doing.

Rudolph Lyons following. Even if the counts were properly tried together, the judge should have warned the jury that the evidence relating to each count must be considered separately: *R. v. Bailey*.¹⁰ There was no such warning in the present case. No submission was made at the close of the case for the prosecution that there was no evidence fit to be left to the jury on any of the first seven counts, because the defence took the view that that point had already been decided by the judge.

Sir Lionel Heald A.-G., Hylton-Foster Q.C. and Snowden for the Crown. It is conceded that there would have been a fundamental difference if the jury had been directed not to consider any of the evidence relating to the first seven counts. The evidence of those counts was admissible only if the broad principle referred to in *R. v. Sims*¹¹ applies. That there is a doubt on the present position is clear from a comparison between Roscoe's Criminal Evidence, 16th ed., p. 96, and Kenny's Outlines of Criminal Law, 16th ed., p. 552. The first proposition is set out in the headnote to the report of *R. v. Sims*¹¹: "Where
"several counts are joined in one indictment, the mere fact that
"evidence is admissible on one count and inadmissible on
"another is not in itself a ground for directing separate trials,
"unless the prejudice created by such evidence would be
"improper and too great to be overcome by any direction in
"the summing up." This is not open to objection. The second proposition set out is: "Evidence that the accused has a bad
"reputation or a bad disposition is to be excluded only if it
"shows nothing more. Where it relates also to other acts
"having specific features connecting the accused with the crime
"charged, it is admissible, irrespective of the issues raised by
"the defence." This is open to doubt. The question whether the evidence objected to in this case was admissible must be decided before it can be said whether harm was done or not. That question falls into two parts: (1) Was the evidence of

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⁹ [1946] K.B. 369.

¹¹ [1946] K.B. 531.

¹⁰ [1924] 2 K.B. 300, 305.

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previous similar facts admissible on well-recognized principles?
(2) Was the actual evidence given in the present case admissible?

On the first question the history and development of the law leads to clear principles provided one keeps to the main current of authority and does not engage in exploration. The main current of authority shows that such evidence is admissible only in rebuttal in the strict sense, and further that the evidence itself must be strictly relevant for the purpose of rebutting specific facts or allegations. It must not be in the form of a general reply that the defendant is an undesirable person. Further, the evidence must identify the defendant in connexion with previous similar acts, though such identification need not be visual and may be circumstantial. In *R. v. Sims*¹¹ the Court of Criminal Appeal held that such evidence need not be given only in rebuttal in the strict sense, that a plea of "Not Guilty" entitled the prosecution to introduce evidence of similar facts and that the defendant need not have set up or indicated any affirmative defence.

It may be argued in the present case that the evidence relating to the first seven counts was not admissible because it was not evidence of similar facts, but mere prejudice. The fact that some of the evidence on the first seven counts was of no probative value on the eighth count was no reason for not trying the counts together, but the summing-up should have warned the jury to distinguish the evidence relating to the respective counts. The Crown accept the proposition that if there was a misdirection, it cannot be assumed that the verdict of the jury would have been the same apart from such misdirection and would not ask the House to apply the proviso to section 4 (1) of the Criminal Appeal Act, 1907. The Crown also agree to the proposition that there should be no erosion of the rule laid down in *Makin v. Attorney-General for New South Wales*.¹² That authority stands like a rock on the bank of a flooded river, and the modern developments from it—*R. v. Smith*¹³; *R. v. Armstrong*¹⁴; *R. v. Bywaters*¹⁵ and *R. v. Hall*¹⁶—are like stepping stones leading into deep water. See also two articles on "Evidence of Other Offences" by F. L. Stow (1922) 38 Law Quarterly Review, p. 63, and by Ernest E. Williams (1923) 39 Law Quarterly Review, p. 212.

¹¹ [1946] K.B. 531.¹² [1894] A.C. 57.¹³ [1915] W.N. 309; 84 L.J.K.B. 2153.¹⁴ [1922] 2 K.B. 555.¹⁵ (1922) 17 Cr.App.R. 66¹⁶ [1952] 1 K.B. 302.

The real question is, what is meant by evidence being "relevant"? If evidence is otherwise relevant, it is not to be excluded merely because it is prejudicial. Relevant, however, does not necessarily mean "logically probative." The real nigger in the wood-pile has been an article by Lucius Stone in the Harvard Law Review of 1932, vol. 46, pp. 954 et seq., which suggests that all matters having sufficient probative value can be given in evidence. *Perkins v. Jeffery*,¹⁷ on the other hand, suggests that evidence relating to another occasion should not be given unless and until a defence has definitely been put forward. That is not a complete statement of the law because in some cases there is no need to wait until a defence which could reasonably be anticipated has been put forward, e.g., where it is sought to establish mens rea: Kenny's Outlines of Criminal Law, 16th ed., p. 583. It has always been repugnant to the English courts that a man's record should be used against him. Lucius Stone, in his article, argued that there never was any such rule in English law, but the Crown concede that there is such a rule now: If a man's previous record cannot be used against him, a fortiori previous suspicious circumstances should not be proved against him without identification. If one of the propositions laid down in *R. v. Sims*¹⁸ was that anything which helps to prove guilt can be introduced, it is not sought to support that aspect of the decision. Under French law the court has to arrive at a "conviction intime" of the guilt of the accused and the judge requires all the available evidence as to his reputation. French law excludes nothing that could help the judge to reach his decision. In English law only the facts of the particular case are being tried, and the courts are more in the position of referees whose duty is to see whether the rules have been complied with. *R. v. Hall*¹⁹ contains a dangerous statement of the law: "As soon as it becomes clear that the prisoner's defence is that the facts alleged by the prosecution have an innocent and not a guilty complexion evidence may be given which otherwise might be inadmissible; and it is not the less admissible because it shows, or tends to show, that the prisoner has been guilty of another offence." That is a development of the speech of Lord Sumner in *Thompson v. The King*.²⁰ All the decisions have emphasized the nature of the evidence which will be accepted in such cases. Evidence which has the indirect effect

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¹⁷ [1915] 2 K.B. 702.¹⁸ [1946] K.B. 531.¹⁹ [1952] 1 K.B. 302, 307.²⁰ [1918] A.C. 221, 232.

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of identifying the accused person may be sufficient: see *R. v. Mortimer*.²¹ It is conceded that *R. v. Sims*²² is in opposition to *Makin v. Attorney-General for New South Wales*,²³ and the two cannot stand together.

Evidence of previous incidents must be strictly relevant to the purpose for which it is addressed. The test is: What is it designed to prove? Here it cannot prove what happened on July 22 and must be designed to disprove some point of the defence.

[They referred to *Moorov v. Lord Advocate*,²⁴ and an article on The Application of the Rule in *Moorov* by William Jardine Dobie (1946) 58 *Juridical Review*, p. 201.]

Hylton-Foster Q.C. following. The question is: Was the evidence in regard to counts 1 to 7 shown to be evidence relating to the appellant on the whole of the case? If so, it was rightly admitted. The prosecution proved in relation to July 22, facts which bore the appearance of guilt so as to require of the appellant an explanation consistent with innocence. The appellant, in an interview with his inspector, gave such an explanation. At that point an issue was raised, on which it was right for the prosecution to call evidence of other similar thefts, and that became evidence of previous thefts committed by the appellant. There were two factors pointing to the appellant's guilt in relation to the offence of July 22, (1) his position immediately after the theft and (2) his refusal to recognize the two detectives who spoke to him and whom he knew well. He had to explain why at that point of time he had brought his beat to that particular place. The evidence admitted tended to show that the earlier offences had characteristics in common with the offence of July 22 which linked them with the appellant. (a) On each occasion only part of the available money was taken. (b) The appellant had the opportunity of committing the whole range of offences. (c) Both the thief and the appellant had special opportunities at week-ends. (d) The thief was a person who attracted no attention, and no intruder was ever seen on any occasion. (e) The thief and the appellant refrained from using available opportunities at the times when the appellant was away. All these factors tend to establish the relevance of the evidence with regard to the earlier offences to the last count.

Burton Q.C. in reply. It is not desired to add anything on to the main point. With regard to the admission of evidence of

²¹ (1936) 25 Cr.App.R. 150, 157.

²² [1894] A.C. 57.

²³ [1946] K.B. 531.

²⁴ 1930 S.C.(J.) 68.

similar facts, there was no dispute that the money was stolen and no question of mens rea entered into the problem. The appellant said he was on his beat innocently and innocently failed to recognize the detectives. It was not right to introduce evidence of similar offences merely to rebut his statement. If a country postman on his round is found by a policeman near the scene of a burning hayrick, the policeman calls to him and he ignores the call, saying afterwards that he did not hear, that can be no ground for admitting evidence of seven previous fires on his round. None of the evidence relating to the previous occasions went so far as to connect the appellant with a theft: see *Thompson v. The King*,²⁵ per Lord Sumner. Often no thefts occurred when the appellant was on duty. The first proposition in the headnote to *R. v. Sims*²⁶ is not challenged; but the second proposition, it is submitted, is wrong.

With regard to the application of the proviso to section 4 (1) of the Criminal Appeal Act, 1907, it is not usual to apply the proviso where inadmissible evidence has been admitted. If the judge had excluded the evidence relating to the first seven counts, the jury might still have convicted, but it cannot be said that they must necessarily or would probably have done so.

*Hylton-Foster Q.C. R. v. Whybrow*²⁷ is an instance of the application of the proviso despite a substantial misdirection in law. The test is: Would a reasonable jury properly directed without doubt have convicted on the eighth count?

March 13. The House of Lords received the report of the Appellate Committee. Viscount Simon said that he had to inform the House that the Committee reported that in their opinion the appeal should be allowed and moved that further consideration of the report be adjourned. The motion was carried.

April 9. The House further considered the report.

VISCOUNT SIMON stated the facts and continued:—Before the appellant was arraigned and in the absence of the jury, his counsel asked for the severance of the indictment and urged that the charge contained in the eighth count should be tried first and separately. The judge applied section 5 (3) of the Indictments Act, 1915, and ruled that there was no good reason for ordering

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²⁵ [1918] A.C. 221, 236.

²⁶ [1946] K.B. 531.

²⁷ (1951) 35 Cr.App.R. 141.

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a separate trial on the eighth count and that the case fell within rule 3 of Sch. I to the Act, since the charges formed part of a series of offences of the same or a similar character. In so deciding, the learned judge was rightly exercising his discretion and no valid objection could be taken to his ruling. It was urged that the first seven counts if taken alone would be unsupported by any relevant evidence. But to this the answer was suggested that if a jury took the view that the resemblance between the different thefts was so close that they must be regarded as the work of a single thief, the evidence of what happened on July 22 might be considered as identifying the criminal on all the counts. The jury, however, returned, as it was entitled to do, a verdict of not guilty on the first seven counts, but found the appellant guilty on the eighth count.

He appealed to the Court of Criminal Appeal against this conviction on various grounds, to one of which reference must be made hereafter. His appeal was dismissed, but, as already stated, he obtained the certificate of the Attorney-General that the decision of the Court of Criminal Appeal involved a point of law of exceptional public importance, and that a further appeal should be brought. The Criminal Appeal Act, 1907, while conferring this power upon the Attorney-General, does not require that his certificate should indicate what is the point of law which he considers should in the public interest be thus brought for final decision before this House. In the present instance, moreover, the House was without the assistance usually derived from previous written formulation of the arguments and reasons put forward on either side. On the hearing of the appeal, however, counsel for the appellant made it clear that his main contention was that evidence as to the thefts that had occurred on the first seven occasions, when the accused was not shown to be near the shop at the time when they occurred, could not be advanced by the prosecution or considered by the jury as part of the material to prove the charge on the eighth occasion. The Attorney-General presented the problem arising on the appeal more widely and in effect invited the House to deal with a series of authorities beginning with *Makin v. Attorney-General for New South Wales*,²⁸ in which limits as to the admissibility of evidence of "similar facts" had been suggested or laid down, and to decide whether the principle enunciated in *Makin's* case²⁸ should now be treated as modified or its application regarded as extended.

²⁸ [1894] A.C. 57.

In my opinion, the principle laid down by Lord Herschell L.C. in *Makin's case*²⁸ remains the proper principle to apply, and I see no reason for modifying it. *Makin's case*²⁸ was a decision of the Judicial Committee of the Privy Council, but it was unanimously approved by the House of Lords in *R. v. Ball*,²⁹ and has been constantly relied on ever since. It is, I think, an error to attempt to draw up a closed list of the sort of cases in which the principle operates: such a list only provides instances of its general application, whereas what really matters is the principle itself and its proper application to the particular circumstances of the charge that is being tried. It is the application that may sometimes be difficult, and the particular case now before the House illustrates that difficulty.

The principle as laid down by the then Lord Chancellor is as follows³⁰: "It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused." When Lord Herschell speaks of evidence of other occasions in which the accused was concerned as being admissible to "rebut" a defence which would otherwise be open to the accused, he is not using the vocabulary of civil pleadings and requiring a specific line of defence to be set up before evidence is tendered which would overthrow it. If it were so, instances would arise where magistrates might be urged not to commit for trial, or it might be ruled at the trial, at the end of the prosecution's case, that enough had not been established to displace the presumption of innocence, when all the time evidence properly available to support the prosecution was being withheld. "In criminal cases, and especially in those where the justices have summary jurisdiction, the admissibility of evidence has to be determined

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²⁸ [1894] A.C. 57.³⁰ [1894] A.C. 57, 65.²⁹ [1911] A.C. 47, 71.

H. L. (E.) "in reference to all the issues which have to be established by
 1952 "the prosecution, and frequently without any indication of the
 "particular defence that is going to be set up": *per* Avory J.
 HARRIS in giving the judgment of the Divisional Court in *Perkins v.*
Jeffery.³¹

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✓ Lord du Parc pointed out in *Noor Mohamed v. The King*,³²
 in commenting on what Lord Sumner had said in *Thompson v.*
*The King*³³: "An accused person need set up no defence other
 "than a general denial of the crime alleged. The plea of not
 "guilty may be equivalent to saying 'let the prosecution prove
 "its case, if it can,' and having said so much the accused may
 "take refuge in silence. In such a case it may appear (for
 "instance) that the facts and circumstances of the particular
 "offence charged are consistent with innocent intention, whereas
 "further evidence, which incidentally shows that the accused
 "has committed one or more other offences, may tend to prove
 "that they are consistent only with a guilty intent. The prose-
 "cution could not be said, in their Lordships' opinion, to be
 "crediting the accused with a fancy defence' if they sought
 "to adduce such evidence."

Lord Herschell's statement³⁴ that evidence of "similar
 "facts" may sometimes be admissible as bearing on "the
 "question whether the acts alleged to constitute the crime
 "charged in the indictment were designed or accidental"
 deserves close analysis. Sometimes the purpose properly served
 by such evidence is to help to show that what happened was not
 an accident; if it was, the accused had nothing to do with it.
 Sometimes the purpose is to help to show what was the intention
 with which the accused did the act which he is proved to have
 done. In a proper case, and subject to the safeguards which
 Lord Herschell indicates, either purpose is legitimate. Scrutton
 J. points out the distinction very clearly in *R. v. Ball*.³⁵
 Sometimes the two purposes are served by the same evidence.

The substance of the matter appears to me to be that the
 prosecution may adduce all proper evidence which tends to prove
 the charge. I do not understand Lord Herschell's words to
 mean that the prosecution must withhold such evidence until
 after the accused has set up a specific defence which calls for
 rebuttal. Where, for instance, *mens rea* is an essential element
 in guilt, and the facts of the occurrence which is the subject of

³¹ [1915] 2 K.B. 702, 707.

³² [1949] A.C. 182, 191-2.

³³ [1918] A.C. 221, 232.

³⁴ [1894] A.C. 57, 65.

³⁵ [1911] A.C. 47, 52.

the charge, standing by themselves, would be consistent with mere accident, there would be nothing wrong in the prosecution seeking to establish the true situation by offering, as part of its case in the first instance, evidence of similar action by the accused at another time which would go to show that he intended to do what he did on the occasion charged and was thus acting criminally. *R. v. Mortimer*³⁶ is a good example of this. What Lord Sumner meant when he denied the right of the prosecution to "credit the accused with fancy defences" (in *Thompson v. The King*³⁷) was that evidence of similar facts involving the accused ought not to be dragged in to his prejudice without reasonable cause.

There is a second proposition which ought to be added under this head. It is not a rule of law governing the admissibility of evidence, but a rule of judicial practice followed by a judge who is trying a charge of crime when he thinks that the application of the practice is called for. Lord du Parcq referred to it in *Noor Mohamed v. The King*³⁸ immediately after the passage above quoted, when he said that "in all such cases the judge ought to consider whether the evidence which it is proposed to adduce is sufficiently substantial, having regard to the purpose to which it is professedly directed, to make it desirable in the interest of justice that it should be admitted. If, so far as that purpose is concerned, it can in the circumstances of the case have only trifling weight, the judge will be right to exclude it. To say this is not to confuse weight with admissibility. The distinction is plain, but cases must occur in which it would be unjust to admit evidence of a character gravely prejudicial to the accused even though there may be some tenuous ground for holding it technically admissible. The decision must then be left to the discretion and the sense of fairness of the judge."

This second proposition flows from the duty of the judge when trying a charge of crime to set the essentials of justice above the technical rule if the strict application of the latter would operate unfairly against the accused. If such a case arose, the judge may intimate to the prosecution that evidence of "similar facts" affecting the accused, though admissible, should not be pressed because its probable effect "would be out of proportion to its true evidential value" (*per* Lord Moulton in *Director of Public Prosecutions v. Christie*³⁹). Such an intimation rests entirely within the discretion of the judge.

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³⁶ 25 Cr.App.R. 150.³⁷ [1918] A.C. 221, 232.³⁸ [1949] A.C. 182, 192.³⁹ (1914) 24 Cox C.C. 249, 257.

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It is, of course, clear that evidence of "similar facts" cannot in any case be admissible to support an accusation against the accused unless they are connected in some relevant way with the accused and with his participation in the crime. (See Lord Sumner in *Thompson v. The King*.⁴⁰) It is the fact that he was involved in the other occurrences which may negative the inference of accident or establish his mens rea by showing "system." Or, again, the other occurrences may sometimes assist to prove his identity, as, for instance, in *Perkins v. Jeffery*.⁴¹ But evidence of other occurrences which merely tend to deepen suspicion does not go to prove guilt. This is the ground, as it seems to me, on which the Judicial Committee of the Privy Council allowed the appeal in *Noor Mohamed v. The King*.⁴² The Board there took the view that the evidence as to the previous death of the accused's wife was not relevant to prove the charge against him of murdering another woman, and if it was not relevant it was at the same time highly prejudicial. It is to be noted that the Judicial Committee did not question the decision in *R. v. Sims*.⁴³

It remains to examine certain reported cases dealing with admissibility of evidence of "similar facts" decided since *Makin's* case,⁴⁴ to which the Attorney-General referred us. Rightly understood, these cases do not seem to me to involve any enlargement of the area within which evidence of "similar facts" might be admitted.

In *R. v. Smith*,⁴⁵ the accused was charged with murdering a woman, immediately after going through a form of marriage with her, by drowning her in a bath in the lodging where they were staying. Evidence was held to be rightly admitted of very similar circumstances which connected the accused with the deaths at a later date of two other women who were drowned in their baths after the accused had gone through a form of marriage with each of them in turn. In all three cases it was shown that the accused benefited by the death. In all three cases the prisoner urged the woman to take a bath and was on the premises when she prepared to do so. The ground on which the evidence of the two later occurrences was admissible was that the occurrences were so alike and the part taken by the accused in arranging what the woman would do was so similar in each case

⁴⁰ [1918] A.C. 221, 234.

⁴¹ [1915] 2 K.B. 702.

⁴² [1949] A.C. 182, 192.

⁴³ [1946] K.B. 531.

⁴⁴ [1894] A.C. 57.

⁴⁵ [1915] W.N. 309; 84 L.J.K.B. 2153.

as to get rid of any suggestion of accident. The decision in *R. v. Smith*⁴⁵ therefore involved no extension of the principle laid down in *Makin's* case.⁴⁶ The challenged evidence was admissible both to show that what happened in the case of the first woman was not an accident and also to show what was the intention with which the accused did what he did.

In *R. v. Armstrong*⁴⁷ the accused was indicted for the murder of his wife by administering arsenic to her. The wife was shown to have died from arsenical poisoning, but the defence urged that it was not shown that the husband had administered the poison to her, but that she had committed suicide. The accused had purchased a quantity of arsenic and made it up into a number of small packets, each containing what would constitute a fatal dose, but offered the explanation that he had purchased the poison merely to use it as a weed-killer in his garden. The prosecution called evidence to show that, eight months after the death of his wife, he secretly administered arsenic to another person. The Court of Criminal Appeal held that this evidence was admissible because it went to disprove the suggestion that he had purchased and kept arsenic for an innocent purpose. The decision in *R. v. Armstrong*⁴⁷ appears to me to involve no enlargement of the principle in *Makin's* case.⁴⁸ Lord Hewart C.J. rightly observed⁴⁹: "The fact that he was subsequently "found not merely in possession of but actually using for a "similar deadly purpose the very kind of poison that caused the "death of his wife was evidence from which the jury might infer "that that poison was not in his possession at the earlier date for "an innocent purpose."

I do not find anything in the report of the cases of *R. v. Bywaters*⁵⁰ and *R. v. Thompson*⁵¹ which could be read as extending the principle of *Makin's* case.⁵²

In *R. v. Sims*⁵³ there is a passage in the judgment of Lord Goddard C.J. which appears to have raised doubts in some quarters as to whether the principle in *Makin's* case⁵² was being extended. The Lord Chief Justice there observed that one method of approaching the relevant problem is to start with the general proposition that all evidence that is "logically probative" is admissible unless excluded by established rules, and that it

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⁴⁵ [1915] W.N. 309; 84 L.J.K.B.

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⁴⁶ [1894] A.C. 57.

⁴⁷ [1922] 2 K.B. 555.

⁴⁸ [1894] A.C. 57.

⁴⁹ [1922] 2 K.B. 555, 566.

⁵⁰ (1922) 17 Cr.App.R. 66.

⁵¹ (1922) 17 Cr.App.R. 71.

⁵² [1894] A.C. 57.

⁵³ [1946] K.B. 531, 539.

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would follow that evidence for the prosecution "is admissible" "irrespective of the issues raised by the defence." It is the words "logically probative" which have raised doubts in some minds. Such a phrase may seem to invite philosophic discussion which would be ill-suited to the practical business of applying the criminal law with justice to all concerned. But I do not understand the Lord Chief Justice by the use of such a phrase to be enlarging the ambit of the principle in *Makin's* case⁵² at all or to be disregarding the restrictions which Lord Herschell indicated. In one sense, evidence of previous bad conduct or hearsay evidence, might be regarded as having, logically, a probative value, but, of course, the judgment in *Sims'* case is not opening the door to that. I understand the passage quoted to mean no more than what I have already formulated, viz., that the prosecution may advance proper evidence to prove its case without waiting to ascertain what is the line adopted by the defence. Lord du Pareq, in *Noor Mohamed v. The King*,⁵⁴ points out the possibility of misunderstanding the Lord Chief Justice's words and proceeds to put his own construction upon them. In substance, I agree with his interpretation. There is, however, this to be added. The proper working of the criminal law in this connexion depends on the due observance of both the propositions which I have endeavoured to expound in this judgment. While the prosecution may adduce all proper evidence which tends to prove the charge, it must do so with due regard to the warnings contained in the judgments of Kennedy J. in *R. v. Bond*⁵⁵ and Lord Sankey L.C. in *Maxwell v. Director of Public Prosecutions*.⁵⁶ A criminal trial in this country is conducted for the purpose of deciding whether the prosecution has proved that the accused is guilty of the particular crime charged, and evidence of "similar facts" should be excluded unless such evidence has a really material bearing on the issues to be decided. This, in my opinion, is the way in which Lord Sumner's observations in *Thompson v. The King*⁵⁷ should be regarded. It should be noted that in that case Lord Parker⁵⁸ was careful to insist that it would be wrong to treat the decision as "laying down any" "principle capable of general application." With this explanation, I see no reason to differ from the conclusion in *R. v. Sims*.⁵⁹

⁵³ [1946] K.B. 531, 539.⁵⁴ [1949] A.C. 182, 194-6.⁵⁵ [1906] 2 K.B. 389, 398.⁵⁶ [1935] A.C. 309, 320.⁵⁷ [1918] A.C. 221, 232.⁵⁸ Ibid. 231.⁵⁹ [1946] K.B. 531.

I have already expressed my view of the explanation of the decision in *Noor Mohamed v. The King*.⁶⁰ It appears to me to turn on the court's view of the relevance of the earlier facts. So regarded, it is not an authority which ought to raise doubts as to the proper application of the principle in *Makin's* case, or as disturbing the two governing propositions which I have set out above.

Lastly, I must refer to *R. v. Hall*.⁶¹ The way in which the judgment of the Lord Chief Justice in that case was framed was manifestly in deference to the passage in *Noor Mohamed v. The King*,⁶² which I have already discussed. On any view, the decision of the Court of Criminal Appeal was right and I trust that the decision now being given by this House may serve to clear up some of the perplexities which *R. v. Hall*⁶³ showed to have arisen. It must always be remembered that every case is decided on its own facts, and expressions used, or even principles stated, when the court is considering particular facts, cannot always be applied as if they were absolute rules applicable in all circumstances.

Applying the above general propositions to the case before us, it appears to me that the only difficulty arises from the form of the summing-up. The judge, having decided that the eight counts should be tried together, did not warn the jury that the evidence called in support of the earlier counts did not in itself provide confirmation of the last charge. Yet, if the eighth count had been the only charge to be tried, it is difficult to see how the fact that there had been similar thefts of the same pattern before would confirm the allegation that the appellant was the thief on July 22. The eighth count raised two issues: (1) Was the money stolen on July 22? (2) Is it proved that it was the appellant who stole it? Previous events could not confirm (1), which indeed was proved beyond dispute. As for (2), the accused denied that he was the thief and the fact that someone perpetrated the earlier thefts when the accused may have been somewhere in the market does not provide material confirmation of his identity as the thief on the last occasion. The case against him on July 22 depended on the facts of that date. Yet the jury may well have been swayed, however illogically, in reaching its verdict on the eighth count by the earlier evidence. It should have been warned of this danger, especially as *R. v. Sims*.⁶⁴

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⁶⁰ [1949] A.C. 182.⁶¹ [1952] 1 K.B. 302.⁶² [1949] A.C. 182.⁶³ [1952] 1 K.B. 302.⁶⁴ [1946] K.B. 531.

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shows that on an indictment containing several counts evidence may be given which supports only some of them. See the observations of Lord Hewart C.J. in *R. v. Bailey*.⁶⁵ One of the grounds stated in the appellant's notice of appeal to the Court of Criminal Appeal was that the judge failed to direct the jury that it was its duty to consider each count separately and not to be influenced in its decision upon the eighth count by the evidence of the earlier thefts. The judge did indeed, in his summing-up, go through each count separately, but he treated the evidence as cumulative and told the jury that the main question was whether it was satisfied that the appellant "stole the money" without pointing out that the relevant considerations might be somewhat different on the different counts. True it is that the jury by its verdict distinguished between them, but the fact remains that it was not directed to consider what part of the evidence was properly of weight in deciding its verdict on the eighth count.

This leaves a final question to be determined, viz., whether the error can be regarded as immaterial in view of the proviso to section 4 (1) of the Criminal Appeal Act, 1907, on the ground that no substantial miscarriage of justice has actually occurred. If it could be said that a reasonable jury after being properly directed would, on the evidence properly admissible, without doubt have convicted on the eighth count, the proviso should be applied. This is the test laid down by this House in *Stirland v. Director of Public Prosecutions*.⁶⁶ It is sufficient to say that, in the present instance, it would be going too far to make this assumption and the appeal must therefore be allowed.

Section 44 of the Criminal Justice Act, 1948, gives this House a discretion, when a criminal appeal is determined in favour of the accused, to direct payment out of local funds of costs to meet expenses incurred by him in the appeal to this House or in the prosecution of his appeal to the Court of Criminal Appeal. It is not the practice of the Court of Criminal Appeal to grant a successful appellant costs of an appeal to it save in exceptional circumstances, and so far as that court is concerned there is no special reason for disturbing that practice on the present occasion. But I think that the appellant should receive his taxed costs in respect of his appeal to this House. The section requires that this should be done by directing the proper payment out of local funds, but I understand that the Director of Public Prosecutions

⁶⁵ [1924] 2 K.B. 300.

⁶⁶ [1944] A.C. 315.

has already met, or agreed to meet, much of the appellant's expenses, and the effect of the House's order will therefore be to require local funds to bear only the balance, if any.

My Lords, my noble and learned friend, LORD PORTER, who is unable to be present today, authorizes me to say that he agrees in all respects with this opinion.

LORD OAKSEY. My Lords, I agree with the principles stated by the noble Viscount on the woolsack as to the admissibility of evidence, but I find myself unable to agree with your Lordships' application of those principles to the facts of the case. I agree with your Lordships that the discretion of Pearson J. to try the eight counts together ought not to be disturbed. As I understand it your Lordships are of the opinion that the evidence on counts 1 to 7 was relevant on the eighth count but so slightly relevant that it should have been excluded by the judge. I agree with the principle that the judge at the trial has a discretion to exclude evidence which though strictly speaking admissible is only slightly relevant and if it relates to former offences by the accused may have a prejudicial effect out of proportion to its relevance, but I do not agree that that principle is applicable to the facts of this case and I am of the opinion that the summing-up of Pearson J. and the judgment of the Court of Criminal Appeal were right.

There is, in my opinion, no question of general importance in this appeal. The only question is: Do the facts which were proved as to the thefts referred to in counts 1 to 7 tend so slightly to implicate the accused in the crime in July on which he was charged in the eighth count that they ought to have been excluded?

The facts on the eight occasions were undoubtedly similar; the premises were the same; the method of entry to the premises was the same; the money taken was less than the money on the premises; the accused might have broken into the premises while on duty as a police constable when money was stolen; and when he was on leave no thefts took place. The only difference in the July facts was that the accused was proved then to be close by the premises directly after the alarm was given in circumstances of suspicion.

It is, in my opinion, important to observe that there was no direct evidence that the accused broke in and committed the theft in July. The evidence, of course, was much more cogent than the evidence of May and June, but it was not conclusive and was really only a much stronger case of opportunity. It is true

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that the admission of the evidence of the facts of May and June involves the suggestion that the accused committed crimes other than the particular crime on which *ex hypothesi* he was being tried, and if the only relevance of the facts as to counts 1 to 7 was that he had committed crimes on those occasions, I should agree that evidence of such facts would be inadmissible. But that is not the only relevance of these facts. Their relevance consists and consists only, in my opinion, in the similarities which existed between the facts of May and June and the facts of July. It is one thing to prove that the accused has committed a number of different crimes on different occasions; it may be a totally different thing to adduce evidence which tends to show that he has committed the same sort of offence in the same circumstances on several occasions. I do not understand your Lordships to hold that the evidence of what happened in July was inadmissible or should have been excluded on any of the counts 1 to 7 and, if that is so, it could, in my opinion, only be because of the same similarities in the evidence, from which it might be inferred that the accused stole the money on the first seven occasions although there was no direct evidence that he was in fact present when the money was stolen on any one of those occasions. The question may be tested in this way: can it be said that no jury could reasonably find that one person committed all eight thefts? In my opinion, the same similarity must be equally relevant whether it is adduced on one count or on the others.

My Lords, I desire to add that I do not agree with the observations made by Lord du Parcq in stating the advice tendered to His Majesty in Council in the case of *Noor Mohamed v. The King*,⁶⁷ in which he criticized the judgment of the Court of Criminal Appeal in *R. v. Sims*.⁶⁸ I do not agree with that criticism, which was not in any way necessary to the decision of the case of *Noor Mohamed v. The King*.⁶⁹ I see nothing wrong in approaching the question what evidence is admissible by considering first the general rule as to admissibility and secondly what are the exceptions to it. No one doubts that evidence of previous or subsequent bad or criminal conduct on the part of the accused is to be excluded unless it is relevant to some issue in the case, but it is for the prosecution to prove the guilt of the accused and the prosecution must in proving facts which are more consistent than not with the guilt of the accused negative

⁶⁷ [1949] A.C. 182, 194.⁶⁹ [1949] A.C. 182.⁶⁸ [1946] K.B. 531.

any defence which is open to the prisoner, to use the words of Lord Herschell L.C. in *Makin v. Attorney-General for New South Wales*.⁷⁰ It is probably impossible to give an exhaustive definition of the kind of defences which may be open to a prisoner or of the kind of bad or criminal conduct which may be relevant to the question of his guilt on the particular charge on which he is being tried.

The issue to which the evidence in question was, in my opinion, relevant was whether the accused was near the premises in July for an innocent purpose or not.

For these reasons I agree with the judgment of the Court of Criminal Appeal.

LORD MORTON OF HENRYTON. My Lords, I agree with the speech which has been delivered by my noble and learned friend on the woolsack. I desire only to add that, in my view, evidence as to the thefts which occurred on the first seven occasions was not admissible for the purpose of the trial of the appellant on the eighth count, because the appellant was not proved to have been near the shop, or even in the market, at the time when these thefts occurred. It is, however, clear that the judge invited the jury to take that evidence into account when considering the eighth count. In making these observations, I do not regard myself as differing in any way from the speech with which I have just expressed my agreement. I make them only for the purpose of explaining why I cannot accept the views which have just been expressed by my noble and learned friend, Lord Oaksey.

LORD TUCKER. My Lords, for the reasons which have been stated by my noble and learned friend on the woolsack, I concur in the motion which he has proposed.

I agree with my noble and learned friend, Lord Morton of Henryton, that the evidence with regard to the first seven occasions was irrelevant to the charge on the eighth count, but was left to the jury as relevant.

Appeal allowed.

Solicitors: *Sidney Torrence & Co., for J. Levi & Co., Leeds;*
Director of Public Prosecutions.

[HOUSE OF LORDS.]

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29, 30;
May 1, 5;
July 11.

Negligence — Personal injuries — Injury to husband resulting in impotence—Claim by wife against defendants for interference with consortium.

A married woman whose husband has been injured by a negligent act or omission has no right of action against the negligent person in respect of loss or impairment of consortium consequential on the injury.

Decision of the Court of Appeal [1951] 2 K.B. 639, affirmed.

APPEAL from the Court of Appeal (Lord Asquith of Bishopstone, Cohen and Birkett L.JJ.).

The facts, stated by Lord Goddard, were as follows:—Mrs. Julia Best, the plaintiff, was about 25 years of age, and she was the wife of Rex Holroyd Best, a man of about 30 years of age. He was a steel erector, and on March 23, 1946, he was employed by the Steel Constructor Co., which at the trial of the action was a third party. This company was carrying out certain work at the factory of the defendants, Samuel Fox & Co. Ltd., at Stocksbridge for the defendants, and on the day mentioned Mr. Best was engaged in re-sheeting the roof of part of the defendants' steelworks. In the course of his work he was obliged to go on to the wheel track of an overhead travelling crane, and whilst he was there, owing to the negligence of the defendants, he was run into by the crane, knocked off the track and, in falling, sustained the most grievous personal injuries. The agreed medical report makes it plain that as a result of his injuries Mr. Best was afflicted with a form of sexual impotence. He still retained the sexual urge but was unable to perform the sexual act. He brought his action against the defendants, alleging breaches of statutory duty and negligence at common law, and on July 20, 1948, at the Leeds Assizes he was awarded the sum of £4,238 15s. with the costs of the action.

About six months after he had succeeded in his action, Mrs. Julia Best issued her writ against the defendants, on January 12,

* Present: LORD PORTER, LORD GODDARD, LORD OAKSEY, LORD MORTON OF HENRYTON and LORD REID.

1949. In her statement of claim, delivered with the writ of summons, she claimed damages from the defendants on the ground that because of their negligence "the plaintiff's consortium with her husband has been interfered with without justification. She has been deprived of the opportunity of having further children and of normal marital relations, as a result whereof she suffers from nervousness, irritability and insomnia. The happiness of her married life has deteriorated and continues to deteriorate. She is restless and suffers from a degree of tachycardia."

Croom-Johnson J. dismissed the action. The Court of Appeal having dismissed her appeal, she appealed to the House of Lords.

Pritt Q.C., *G. N. Black* and *R. P. Smith* for the appellant. It is settled law that a husband can bring an action per quod consortium amisit in respect of any tort by a third person resulting in injury to his wife and thereby depriving him of that consortium. In the circumstances of the present day a wife must enjoy a like right, for the right to consortium is not confined to the husband; the wife too has a right to consortium unimpaired by the wrongful act of a third party. The principles on which this case rests are: (1) Either spouse has a cause of action against any person who causes any loss of consortium by a wrongful injury to the other spouse. (a) The rarity of such actions by a wife in the past is due to procedural causes (viz., that before the Married Women's Property Act, 1882, a married woman could not bring an action without joining her husband as plaintiff). (b) Knowledge of the existence of the wife or an intention on the part of the wrongdoer to injure her is not an integral part of her cause of action. (c) Consortium must be distinguished from servitium. (2) The loss or injury need not be total either in quality or duration.

It follows that if one injures a woman tortiously by injuring her husband, thereby preventing her from being happy and comfortable with him, one must pay her damages, and it matters not that one did not know that she was married to him. That is the defendant's bad luck, just as if a person whom he has run over turns out to be, not an agricultural labourer, but a famous film star.

Authority for the first proposition stated above is found in Bullen and Leake's *Precedents of Pleadings* (1868), 3rd ed., p. 340; Blackstone's *Commentaries* (1768), vol. III, p. 139; *Guy v. Livesey*¹; *Russel v. Corne*²; *Todd v. Redford*³; *Macfadzen v.*

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*Olivant*⁴; *Lynch v. Knight*⁵; *Brockbank v. Whitehaven Junction Railway Co.*⁶; *Butterworth v. Butterworth*⁷; *Gray v. Gee*⁸; *Place v. Searle*⁹; *Newton v. Hardy*¹⁰; *Rees v. Hughes*¹¹; *Mallett v. Dunn*¹²; *Elliott v. Albert*¹³; *Bell v. Bell*¹⁴; *Baker v. Bolton*¹⁵; *Johnson v. The Commonwealth*¹⁶; *Wright v. Cedzich*¹⁷; Salmond on Torts, 10th ed., p. 368 (see also 6th ed., the last by the author, p. 495); Halsbury's Laws of England, 2nd ed., vol. XVI, p. 612, para. 959; Lush on Husband and Wife, 4th ed., p. 53 (see also 2nd ed., the last by the author, p. 9). It should be noted that in *Macfadzen v. Olivant*¹⁸ it appears from the context that the word "consortium" should have been used instead of "servitium": see the terms of the plaintiff's claim and also the second point in the argument in support of the demurrer.

As to rider (a) to the first proposition, see the opinion of Lord Campbell L.C. in *Lynch v. Knight*¹⁹; Lush on Husband and Wife, 4th ed., pp. 53-4; the judgment of Isaacs J. in *Wright v. Cedzich*²⁰; Comyns' Digest (1772 ed.), vol. 1, pp. 575-6. Before 1882 it was simpler for a husband to bring an action in respect of his own injury than for him to bring in addition another action, in which both he and his wife would have to be joined as plaintiffs, in respect of her loss of consortium.

As to rider (b) to the first proposition, see Bullen and Leake's Precedents of Pleadings (1868), 3rd ed., pp. 340, 359, 360; *Stone v. Jackson*²¹; *Fores v. Wilson*²²; Clerk and Lindsell on Torts, 10th ed., pp. 333 et seq. The necessity of establishing the violation of a legal right knowingly committed is not the necessary substratum of every action in English law. In cases of actions by a husband arising out of the injury of his wife it is not necessary for him to establish an intent to injure him or knowledge. It is the same in the converse case where the wife is suing. A distinction is to be noted in that prima facie there is nothing wrong in law in persuading a married lady or a maidservant to go somewhere else to work or to live, and in order to make such an act tortious (viz., to ground an action for enticement) there

⁴ (1805) 6 East 387.

⁵ (1861) 9 H.L.C. 577, 588, 591, 593, 599.

⁶ (1862) 7 H. & N. 834.

⁷ [1920] P. 126, 130.

⁸ (1923) 39 T.L.R. 429.

⁹ [1932] 2 K.B. 497.

¹⁰ (1933) 149 L.T. 165, 166.

¹¹ [1946] K.B. 517.

¹² [1949] 2 K.B. 180.

¹³ [1934] 1 K.B. 650, 659.

¹⁴ (1859) 1 Sw. & T. 565.

¹⁵ (1808) 1 Camp. 493.

¹⁶ (1927) 27 S.R. (N.S.W.) 133.

¹⁷ (1930) 43 C.L.R. 493.

¹⁸ 6 East 387, 389.

¹⁹ 9 H.L.C. 577.

²⁰ 43 C.L.R. 493.

²¹ (1855) 16 C.B. 199.

²² (1791) Peake N.P. 77 [55].

must be knowledge of the married state or of the contract of service. But the case of debauching a married woman or a servant is different, for the debauching is a wrongful act.

As to rider (c) to the first proposition, see Lord Campbell L.C. in *Lynch v. Knight*²³; Isaacs J. in *Wright v. Cedzich*²⁴; *Hyde v. Scysson*.²⁵ Consortium, unlike servitium, is mutual to the husband and wife. The enticement cases and the consortium cases are different in their origin.

As to the second proposition, it cannot be the law that if a person destroys the wife's consortium totally for three days he must pay damages but if he partially destroys it for 30 years he is immune. Since a husband can recover for partial loss of consortium there is no reason why a wife should not be able to do so too. There is no authority for the proposition that in her case the only actionable loss of consortium is loss as final and complete as loss of life. She is entitled to the consortium of her husband and if anyone interferes with it he must pay much or little according to the extent of the interference. She is in law entitled to have her consortium without its being trespassed on. It would be a fair analogy to say that if only a total loss of consortium can give a cause of action, the same should be true of loss of servitium: see Rolle's Abridgement, p. 556, ss. 16-17; Blackstone's Commentaries (1768), vol. III, p. 140; Bullen and Leake's Precedents of Pleadings (1868), 3rd ed., p. 340; *Thomlins v. Hoe*²⁶; *Young v. Pridd*²⁷; *Place v. Searle*²⁸; *Mallett v. Dunn*²⁹; *Lynch v. Knight*³⁰; *Stone v. Jackson*³¹; Salmond on Torts, 10th ed., pp. 366-7.

G. N. Black following. There is a distinction between cases of servitium and consortium. In the former knowledge by the defendant must be alleged and proved; in the latter it need not be: see Clerk and Lindsell on Torts, 10th ed., pp. 329-30, 338-9; *Weedon v. Timbrell*³²; *Hodsoll v. Stallebrass*³³; *Martinez v. Gerber*³⁴; *Rex v. Creamer*³⁵; *Winsmore v. Greenbank*.³⁶ While a wife may be doing things for her husband commonly done by a servant she is not doing them as a servant but as a wife. That is part of the consortium and her services are consortium and not servitium.

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Consortium is not the same thing as cohabitation: see *Davies v. Elmslie*.³⁷ It may be interrupted in different ways. When a naval officer is absent from his wife on duty there is no break of consortium, but if a man joined the Navy against his wife's will there might be. Save in special circumstances, imprisonment would amount to a break in consortium.

From the sixteenth century onwards it was established that a wrongful act causing injury to a wife might be actionable at the suit of her husband who would have to allege a wrongful act towards her, causing her injury, per quod he himself suffered damage. The action was sufficiently flexible to cover any damage to the husband and there is no trace of any attempt to confine it to total loss of consortium. In *Hyde v. Scysson*³⁸ the words used were "abduxit et abcaravit" in alleging that the wrongdoer carried away the plaintiff's wife whereby he had lost "solamen et consortium necnon consilium et auxilium." If the argument of the respondents in the present case were right that would be the beginning and the end of the right of action. But there were also cases with an allegation of loss of consortium with no allegation of carrying away: *Guy v. Livesey*,³⁹ where the allegation was of a loss of consortium for three days. See also Comyns' Digest (1772 ed.), vol. 1, p. 576. In *Stone v. Jackson*⁴⁰ there was no suggestion of separation of the wife from the husband: see also *Masper v. Brown*.⁴¹ Loss of consortium does not necessarily import total loss. Wrongful interference with consortium includes partial loss. The development of the enticement action in practice took the place of the "carrying away" action.

The three declarations "abduxit," "per quod negotia . . . infecta" and "per quod consortium amisit" were wide enough to cover any loss to the husband. It was realized from the earliest times that "per quod servitium amisit" was wholly inappropriate to the case of a wife. See, for instance, the expression "per quod negotia domestica remansarunt infecta": *Russel v. Corne*.⁴² See also *Anonymous*.⁴³ In *Young v. Pridd*⁴⁴ the expression is "solamen et consortium." In *Macfadzen v. Olivant*⁴⁵ the words are "comfort, society and fellowship of his said wife." In *Stone v. Jackson*⁴⁶ they are "comfort, benefit and assistance of his said wife in his domestic affairs." It is

³⁷ [1938] 1 K.B. 337.³⁸ Cro.Jac. 538.³⁹ Cro.Jac. 501.⁴⁰ 16 C.B. 199.⁴¹ (1875) 1 C.P.D. 97.⁴² 1 Salk. 119.⁴³ (1639) Jones (W.) 440.⁴⁴ Cro.Car. 89.⁴⁵ 6 East 387.⁴⁶ 16 C.B. 199.

only in *Brockbank v. Whitehaven Junction Railway Co.*⁴⁷ in 1862 that there is an allegation of loss of the wife's "services" as well as "comfort and society." The current of the authorities conforms to the Latin meaning of consors and consortium: see F. G. Plaistowe's Latin Dictionary, and the words of the marriage service in the Book of Common Prayer "mutual society, help and comfort." The cases show the nature of the rights in respect of which the action is brought. The emphasis is on society and comfort. The rights of the spouses in consortium are mutual, separate and similar. There is no authority for saying that the rights of the husband and wife respectively are different in kind. Their relation is mutual and not a matter of "services" in the ordinary sense.

It is said that the courts will not inquire into questions of intercourse between the spouses or of sexual capacity. But the courts do make such inquiries when the claim is by the injured man himself.

Paull Q.C. and *Leslie* for the respondent company. The following propositions are relied on: (1) The only duty owed by an invitor is to take reasonable care not to injure the invitee or damage any property which may be brought onto the invitor's premises; from early times, however, a person in the potestas of another was deemed to be in an analogous position to that of the other person's property. Query, whether since the Married Women's Property Act, 1882, a husband has any right of action "per quod servitium amisit." If one takes away the husband's potestas one does not give the wife a cause of action, though one may take away the husband's. (2) Where loss of consortium is brought about deliberately either the wife can bring an action on the *Lumley v. Gye*⁴⁸ principle or else she has no right of action. She cannot found on any proprietary interest in her consortium; she has rights in the consortium but they are not proprietary and her interest is not sufficient to found an action for damages if it is violated. (3) If the first two propositions are rejected, there is no cause of action "per quod consortium diminutum est" or "per quod partem consortii amisit." Consortium is indivisible and no action for damages will lie for its impairment but only for loss. (4) In any event the court will not hold an inquiry into the sexual relations of husband and wife save in proceedings for nullity of marriage or in respect of cruelty, which are based on the canon law and not on the common law.

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As to the first proposition, the statement of claim does not express the true basis of the action, which is the duty to take reasonable care for the safety of those coming onto the premises. Further, to say that her consortium has been "interfered with" prima facie imports deliberation. The questions arise in cases of negligence: To whom was the duty owed? And if a duty was owed to some person, has that person suffered any recoverable damage? The duty is not owed to *anyone* who may be affected by the negligence: see *Bourhill v. Young*.⁴⁹ If an invitor negligently injures an invitee on his premises the mother, sister, daughter and wife of the invitee may suffer severe physical and mental strain in consequence, but it is a proposition unknown to English law that such persons have a cause of action *because* they are affected. A servant may lose his employment because his master is injured by another person's negligence but no principle of law gives him a cause of action against that person. The fact that the person affected may have in relation to the person injured a legal right which is impaired, does not ipso facto give a cause of action to the former. For example, if an architect, who has contracted with a client to design a building, is run over and injured by the negligence of a third party, the client has no right of action against the third party. If a father who has a son at Eton is injured by another person's negligence and in consequence loses money and is obliged to remove his son, the son has no right of action against the wrongdoer. The same would be true of his wife if she was unable to live in the same style as before. Consequently one must inquire precisely what was the ground of the husband's action "per quod consortium amisit" in respect of injury to his wife.

The cause of action in respect of negligence illustrated in *Cattle v. Stockton Waterworks Co.*⁵⁰ was not limited to cases of breach of contract. Anyone injured or anyone whose property had been injured could sue, but it did not go beyond that. A husband could sue for loss of consortium because it was analogous to property. Because a wife and a servant were in medieval times in the potestas of the husband or master, he had an action for loss of consortium or servitium. The husband had a cause of action based on potestas but the wife had not. The ground of all the old cases is taking the wife out of her husband's potestas. If the appellant's argument was right it would be strange that there had never been a corresponding action brought by a wife.

⁴⁹ [1943] A.C. 92.⁵⁰ (1875) L.R. 10 Q.B. 453, 457-8.

The first authority on this branch of the case is Bracton, *De Legibus Angliae* (c. 1250), edited by Sir Travers Twiss, vol. II, pp. 546-7 [Rolls Series, vol. 70], though "in potestate" is not well translated as "under his authority." In Bacon's *Abridgement* (1736), 1832 ed., vol. I, pp. 732-3, the distinction between actions in which the husband sues alone ("ad damnum ipsius") and where the wife also joins ("ad damnum ipsorum") is discussed. See also Blackstone's *Commentaries* (1765), 1811 ed., pp. 138-9, 142-3, where *Guy v. Livesey*⁵¹ and *Hyde v. Scyssor*⁵² are cited; Holdsworth's *History of English Law*, vol. VIII, pp. 427-8; Pollock and Maitland, *History of English Law*, 2nd ed., pp. 405-6. In Clerk and Lindsell on Torts the passage at p. 236 of the 6th ed., relating to servants is practically the same as the corresponding passage at p. 329 of the 10th ed., but the passages at p. 245 of the 6th ed. relating to a wife's right to sue are put rather differently at p. 339 of the 10th ed. In *Guy v. Livesey*⁵³ the basis was "per quod consortium amisit" because the wife went away and the consortium was broken and the husband was deprived of her company. (Assault was alleged because the wife could not consent to adultery and therefore the adulterer was deemed to assault her.) The analogy of master and servant was referred to and *Chomley v. Conges*⁵⁴ was cited. See also *Hyde v. Scyssor*.⁵⁵ So too in *Young v. Pridd*⁵⁶ it appears that the basis of this action is loss of the wife's company not the fact of her lying sick unable to do any work. The action "per quod consortium amisit" was not concerned with battery, as we now understand it. *Anonymous*,⁵⁷ which at first sight appears to be in favour of the appellant, is not, for there is nothing to show that the battery did not include taking away the wife. In the action "per quod consortium amisit" the damage is "ad damnum ipsius" and not "ad damnum ipsorum": see *Russel v. Corne*.⁵⁸ *Newton v. Hatter*⁵⁹ is not of assistance in this case. In *Todd v. Redford*⁶⁰ "per quod consortium amisit" was not alleged, though one would have expected it if the appellant's argument had been right. It was simply an assault case. *Read v. Marshal*⁶¹ is a similar case: see also *Winsmore v. Greenbank*⁶²; *Macfadzen v. Olivant*⁶³; *Baker v. Bolton*⁶⁴; *Stone v.*

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H. L. (E.) *Jackson*⁶⁵; *Brockbank v. Whitehaven Junction Railway Co.*⁶⁶ and *Admiralty Commissioners v. S.S. Amerika*.⁶⁷ In Bullen & Leake's *Precedents of Pleadings* (1868), 3rd ed., p. 340, the stress is on "society and services" and "comfort and services" and in respect of "services" a wife could never have sued.

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The rights and obligations of a husband and wife are, and always have been, essentially different. A husband is and always has been under a legal obligation to support his wife. The wife has not and never has had a legal obligation towards her husband to support him, though by certain statutes she has obligations in this connexion towards certain poor law authorities: see *Lush on Husband and Wife*, 4th ed., p. 380. Again, a husband has a right to maintain an action for damages against a third party for adultery. The basis of this was status and taking the wife out of his potestas. Criminal conversation is analogous to loss of consortium: see *Weedon v. Timbrell*.⁶⁸ Again, so long as a husband and wife are living together the husband alone has a right of action for the seduction of a daughter: see *Halsbury's Laws of England*, 2nd ed., vol. XVII, p. 671, para. 1392. At common law there is no legal obligation to support a child; the obligation rests on social duty. The basis of the action for seduction rests on the theory of services owed to the father. See also *Peters v. Jones*.⁶⁹

As to the query to the first proposition, see *Rees v. Hughes*.⁷⁰

As to the second proposition, the wife's right in the consortium is semi-contractual. That provides a basis for her right to bring an action for enticement. If it is not the basis there is no other, for she cannot rely on any proprietary right: see *Place v. Searle*⁷¹; *Mogg v. Mogg*⁷²; *Wright v. Cedzich*⁷³; *Lynch v. Knight*⁷⁴; *Chitty on Pleading*, 9th ed., vol. I, p. 150.

As to the third proposition, separation is not necessarily enough to break the consortium. The mental attitude of the parties may make all the difference. Different results would ensue if the wife were in hospital or if she were living with another man or if the husband were on service abroad. If the wife of a barrister wished him to return a brief to attend her bridge party and he refused there would be no break in their consortium. The idea lying behind consortium is partnership or

⁶⁵ 16 C.B. 199.

⁶⁶ 7 H. & N. 884.

⁶⁷ [1917] A.C. 38, 44, 54.

⁶⁸ 5 Term Rep. 357.

⁶⁹ [1914] 2 K.B. 781.

⁷⁰ [1946] K.B. 517, 525-6.

⁷¹ [1932] 2 K.B. 497, 520.

⁷² (1824) 2 Addams Ecc. 292.

⁷³ 43 C.L.R. 493, 525.

⁷⁴ 9 H.L.C. 577.

association. One cannot have part of a partnership; it either exists or it does not exist. It is not broken because one party goes away for a while. There is no break unless one can show that at one particular moment the whole consortium has gone. The consortium is not impaired because the spouses have grown old and no sexual intercourse takes place. Consortium does not depend on a number of factors all of which must be present. It is an abstraction depending largely on the mental attitude of the parties: see *Russell v. Russell*⁷⁵ and Holdsworth's History of English Law, vol. VIII, p. 430.

As to the fourth proposition, if the appellant's contentions were right the court would be obliged in every accident case to go into the effect on the sexual relations of the parties: see *Russell v. Russell*⁷⁶ and *Weatherley v. Weatherley*.⁷⁷

Leslie following. Blackstone in his Commentaries (1768), vol. III, pp. 139-40, enumerates three wrongs to a husband: abduction, adultery and beating his wife. The order of enumeration is significant as showing the status of the wife at the time. It was not suggested that she had any analogous rights. See also Fitzherbert's *Natura Brevium* (1730), p. 121 (k); Shelford on Marriage and Divorce; *Lynch v. Knight*.⁷⁸ If the contentions of the appellant were correct it would be a reversion to an obsolete status.

Pritt Q.C. in reply. Consors, consortio and consortium are defined in Lewis and Short's Latin Dictionary.

The husband's cause of action in respect of the loss of his wife's consortium rested on negligence or breach of duty. The action brought by husband or wife in respect of enticement is altogether different.

Ours is a living law in a living country, adapting itself to the needs of the times. The older books cited for the respondent company may have been good law formerly but are so no longer. If the argument for the respondent company were pressed to its logical conclusion someone who came to a man's home and persuaded his wife to go away with him would be open to an action for trespass vi et armis even though she said she hated the sight of her husband and was glad to go. If a wife uses her husband's property the Lords who decided *Lynch v. Knight*⁷⁹ were saying something which was wrong and which an elementary

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H. L. (E.) law student would know was wrong. The decision in that case was on the chain of causation, but unless a difference can be discovered between injury to the consortium by defamation on the one hand or by a blow from a crane on the other, it shows that the wife's right to consortium can be protected by an award of damages.

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As to the question of partial loss of consortium the authorities do not say that damages can only be recovered in respect of total loss. In the case of master and servant "*per quod servitium*" "*amisit*" can give ground for recovery of damages for a partial loss. *Guy v. Livesey*⁸⁰ is strong authority for holding that this action can be brought in respect of less than a total loss.

As to the relationship between *servitium* and consortium, when a servant cooks it is *servitium* but when a wife cooks it is consortium. In the case of a wife there is no *servitium* but only consortium.

As to the question of inquiring into the sexual capacity of the parties, this is not such an inquiry. It is only an inquiry into the capacity of one of the parties. The evidence establishes that there are here no secrets of the marriage bed.

Their Lordships took time for consideration.

July 11. LORD PORTER. My Lords, I agree with the view entertained, I believe, by all your Lordships that this appeal should be dismissed.

The salient fact, as I see it, is that the wife had herself suffered no physical injury and could only base her claim on the circumstance that she had lost the consortium of her husband by reason of the injury to him. Such a claim was put forward on the analogy of the enticement cases of which the most recent are *Gray v. Gee*⁸¹ and *Place v. Searle*.⁸² In the first, the jury found for the defendant, and in the latter the statement that the wife had the same right as the husband was obiter. Both, however, take the view that wife and husband alike have a cause of action against a third party who, without justification, destroys that consortium. In that class of case, however, the wrong is a deliberate action taken with the object of inducing the wife to leave her husband or the husband to leave his wife—malicious because it is their mutual duty to give consortium to one another,

⁸⁰ Cro.Jac. 501.

⁸² [1932] 2 K.B. 497.

⁸¹ (1923) 39 T.L.R. 429.

and the defendant has persuaded the errant spouse not to fulfil that duty. They are not authorities for the conclusion that in all cases of tort resulting in injury to the one which deprives the other of his or her consortium the party deprived can sue the wrongdoer, and I know of no case where such a right of action has even been suggested where there is no evidence that the defendant knew of the existence of a wife or husband. Indeed, it has been held (notwithstanding the vigorous opposition of Isaacs J.) in the High Court of Australia in *Wright v. Cedzich*,⁸³ that the wife has no such right.

On behalf of the appellant it is urged that a husband can bring an action for the loss of the consortium of his wife by reason of any tort which deprives him of that consortium and that in the circumstances prevailing today a wife must have a similar right. Even, however, if it be assumed that in enticement cases the husband and wife have equal rights it does not follow that today they have equal rights and liabilities one towards the other in all respects. I do not think it possible to say that a change in the outlook of the public, however great, must inevitably be followed by a change in the law of this country. The common law is a historical development rather than a logical whole, and the fact that a particular doctrine does not logically accord with another or others is no ground for its rejection.

Undoubtedly certain differences between the position of husband and wife have been extinguished or modified by Act of Parliament with the result that the general opinion of the relationship which exists between the spouses has been changed, and it is quite true that modern textbooks express inconsistent opinions. Those which support the argument now presented on behalf of the appellant appear to have founded their conclusions on the observations of some of their Lordships who sat to adjudicate in the case of *Lynch v. Knight*.⁸⁴ Lord Campbell's opinion is certainly in conformity with their view. Lord Wensleydale, on the other hand, was of the opposite way of thinking and expressed a vigorous dissent, whilst the other two members of the House gave no decided opinion. Nor was it necessary to do so.

As Lord Goddard points out, the wife in that case was herself wronged by a defamatory statement, and the question which had to be decided was whether the loss of her husband's consortium

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⁸³ (1930) 43 C.L.R. 493.⁸⁴ (1861) 9 H.L.C. 577.

H. L. (E.) constituted special damage at a time when special damage was a necessary element in the wife's claim, and the actual decision merely determined that on the facts of the case the loss was too remote a consequence of the slander. Those who reject Lord Campbell's view are able to rely upon the older authorities such as Bracton and Blackstone, and to quote the opinion of the late Sir William Holdsworth in favour of their contention, and I see no sufficient reason for rejecting the earlier view.

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Even if it be conceded that the rights of husband and wife ought to be equalized I agree with the Lord Chief Justice that today a husband's right of action for loss of his wife's consortium is an anomaly and see no good reason for extending it. If the change is to be made I should prefer to abolish the husband's right rather than to grant the like remedy to the wife. On this short ground, which has been fully and clearly set out by Lord Asquith, as the first basis of his conclusion, and by Lord Goddard in your Lordships' House, I would dismiss the appeal. As, however, Birkett and Cohen L.JJ. decided the case in the Court of Appeal on a different ground, viz., that consortium is one and indivisible and the wife had not lost it as a whole, and as Lord Asquith agreed with this contention, I think it desirable that I should express a tentative opinion upon it.

My Lords, I think there is much to be said for this view and, indeed, I find it difficult to draw the boundary between what is and what is not loss of consortium or to divide it into its component parts. But having regard to the opinion which I hold on the other contention it is not necessary to come to a final decision on this point in the present case. Nor do I think that any serious damage will be done to a wife by such a conclusion. Today the damages which a husband receives for injury to his wife are commonly measured by his expenses, whether for medical treatment of the wife or in payment for household services which her injuries prevent her from performing, and little, if any, attention is paid to a loss of consortium which involves other considerations beyond those two. The expenses so recovered by the husband fall upon *him* whereas his wife does not incur any similar liability and therefore it is natural that he should recover and she should not. To my mind, it is desirable that causes of action should not be multiplied, but that the wrong to the husband should be compensated by damages to him, if he survives, or, if he dies, to the wife under Lord Campbell's Act or the Law Reform (Married Women and Tortfeasors) Act, 1934, and I see no reason for extending the liability

further than the law demands. As I have said, I would dismiss the appeal. H. L. (E.)

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LORD GODDARD. My Lords, the question that falls for decision in this case may, I think, thus be stated—has a married woman whose husband has been injured by a negligent act or omission a right of action against the person causing that injury for the loss or impairment of consortium consequential on the injury? Croom-Johnson J., in a careful judgment, held that no such right existed. In the Court of Appeal Birkett L.J., who delivered the first judgment, held that a wife had a right of action but only if the consortium was wholly destroyed and not only impaired. Cohen L.J. agreed that the action could not lie for mere impairment as distinct from total loss, but expressed considerable doubt whether the action lay at all. Lord Asquith agreed with the other two members of the court on this point, but was of the opinion that neither for total nor partial loss of consortium had a wife any cause of action. But for the importance and novelty of the case I should have been content to say that I am in entire agreement with his conclusion.

The argument has ranged over a wide field and the industry of counsel has brought to the attention of the House a vast number of cases, but I hope I may not be accused of over simplification if I say that, in my opinion, the question can be determined on a rather short but none the less certain ground.

First, it appears to me desirable to point out that the present suggested cause of action is in truth wholly distinct from what for convenience may be described as one for enticement. In my opinion *Place v. Searle*⁸⁵ was rightly decided, and though that was an action by a husband I agree with the opinion of Scrutton and Slessor L.JJ. that the cause of action that was held available to a husband existed also in a wife, and while it does not appear that Greer L.J. expressed a definite opinion on that matter not only did he not dissent from it but I think it may fairly be gathered from his judgment that he held the same view. Enticement actions depend, in my opinion, on the well established legal principle that the violation of a legal right committed knowingly is a cause of action. This was the ground of the decision in *Lumley v. Gye*⁸⁶; it was emphasized in *Rogers v. Rajendro Dutt*⁸⁷ and established beyond question in this House in *Quinn v. Leathem*.⁸⁸ A wife is entitled to enjoy the society,

⁸⁵ [1932] 2 K.B. 497.⁸⁷ (1860) 13 Moo.P.C. 209.⁸⁶ (1853) 2 E. & B. 216.⁸⁸ [1901] A.C. 495.

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comfort and protection of her husband and to be maintained by him, and if another entices him from her so that she is bereft of those benefits she is as much entitled to claim damages as is a husband whose wife is for any reason, save humanity, abducted or persuaded to leave his home. There has been a conscious and wilful invasion of her right. But here it is said that one who injures another by a breach of duty is liable to the injured person's wife, of whose existence he may be entirely ignorant, because that breach of duty renders the husband incapable in whole or in part of performing all or some of the acts involved in the marriage state. If there be such a cause of action in the wife it must be found either in principle or authority. As to authority I would adopt to these circumstances words used by Lord Sumner in *Admiralty Commissioners v. S.S. Amerika* ⁸⁹ that never during the many centuries that have passed since reports of the decisions of English courts first began has the recovery of damages for such injury been recorded.

It was said for the appellant that this is due to the procedural difficulties which before 1882 precluded a married woman from bringing an action without joining her husband as plaintiff. This no doubt might well account for the reason why no action for enticement had ever been brought by a married woman till the procedural fetters were removed by the Married Women's Property Act, 1882. A married woman could not force her husband to lend his name as plaintiff (*per* Lord Sumner in *Edwards v. Porter* ⁹⁰) and who could suppose that a husband would lend his deserted wife his name to bring an action against his mistress? But if the action were possible what impediment could exist to a husband lending his name to one brought to benefit a wife by reason of an injury done to himself, especially as in the old law the damages when recovered would belong to him? There would be every inducement for him to do so, as the result would be to augment the damages which he would receive; nor do I see that in the action for the loss by the wife of her husband's consortium a plea of *res judicata* or satisfaction could have been set up, on the ground that the husband had been compensated either by action or agreement for the injury suffered by him. The two causes of action would be distinct. As, then, the alleged right of action in the wife is not to be found in authority by what principle can it be supported? The action if any would obviously lie in case. Negligence, if it is to give rise

⁸⁹ [1917] A.C. 38, 51.⁹⁰ [1925] A.C. 1, 42.

to legal liability, must result from a breach of duty owed to a person who thereby suffers damage. But what duty was owed here by the employers of the husband to the wife? If she has an action in this case so must the wife of any man run over in the street by a careless driver. The duty there which gives rise to the husband's cause of action arises out of what may for convenience be called proximity; the driver owes a duty not to injure other persons who are using the road on which he is driving. He owes no duty to persons not present except to those whose property may be on or adjoining the road which it is his duty to avoid injuring. It may often happen that an injury to one person may affect another; a servant whose master is killed or permanently injured may lose his employment, it may be of long standing, and the misfortune may come when he is of an age when it would be very difficult for him to obtain other work, but no one would suggest that he thereby acquires a right of action against the wrongdoer. Damages for personal injury can seldom be a perfect compensation, but where injury has been caused to a husband or father it has never been the case that his wife or children whose style of living or education may have radically to be curtailed have on that account a right of action other than that which, in the case of death, the Fatal Accidents Act, 1846, has given. But it is said, as I understand the argument, loss of consortium stands on a different footing. There the law gives an action to a husband, therefore at least in these days it must give the same to the wife. My Lords, except for *Lynch v. Knight*⁹¹ I do not think it necessary to examine in detail the numerous cases which have been cited, interesting and instructive as many of them are. Not one of them suggests that the wife had an action for the loss of consortium, or that any action lay for injury to her save where some actual battery or assault on her was alleged, where, if the gist of the action was the battery or assault, she could be and ought to be joined as a plaintiff. The passages cited to us from Bracton's *De Legibus Angliæ*, edited by Sir Travers Twiss, vol. II, p. 547 [Rolls Series, vol. 70], Blackstone's *Commentaries* (1768), Book III, chapter 8, and Holdsworth's *History of English Law*, vol. VIII, p. 430—and there are no books of higher authority—all show that the action which the law gives to the husband for loss of consortium is founded on the proprietary right which from ancient times it was considered the husband had in his wife. It was in

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fact based on the same ground as gave a master a right to sue for an injury to his servant if the latter was thereby unable to perform his duties. It was an action of trespass for an invasion of the proprietary right which, arising from the status of villeinage or serfdom, a master had in his servant. On the same footing stood the action of criminal conversation; though it is interesting to observe that the courts seem to have had doubt as to the true nature of that action as it is spoken of in some of the cases as either trespass or case. The fact that the wife consented to adulterous intercourse was no answer, because her consent was irrelevant to the husband's claim for the injury to his right. But a wife could never bring this action and, so far as I know, never tried to. It remains therefore to consider Lord Campbell L.C.'s dicta in *Lynch v. Knight*.⁹² He said: "Nor can I allow that "the loss of consortium, or conjugal society, can give a cause of "action to the husband alone," and later, "I think it *may* be "a loss which the law *may* recognize, to the wife as well as to "the husband," a somewhat guarded dictum. He then goes on to hold that the wife is not the servant of her husband, and says the action of criminal conversation does not rest on the fiction of loss of service as does the action for seduction of a daughter. With this the earlier cases agree as it is based on the interference with his rights as a husband. There was a vigorous dissent by Lord Wensleydale, and a less positive dissent by Lord Brougham, while Lord Cranworth, though strongly inclined to agree with Lord Campbell, refrained from expressing a decided opinion. Clearly therefore the point now before your Lordships was not decided in that case and in fact the decision was on another ground. It is to be observed that the action was one for slander, imputing unchastity to the wife before marriage, and brought before the Slander of Women Act, 1891, had rendered special damage unnecessary to support the action. I think there is much to be said for the opinion of Rich J. in *Wright v. Cedzich*,⁹³ in which he closely analyses the case and comes to the conclusion that Lord Campbell was not supporting the right of a wife to bring an action for loss of consortium, but was considering whether the estrangement of a husband from his wife with consequent distress and suffering of the latter due to the slander was not sufficient special damage to support the action. My Lords, so entirely has the concept of the relation of husband and wife and of master and servant changed since the days of Bracton,

⁹² 9 H.L.C. 577, 589.⁹³ 43 C.L.R. 493.

and indeed of Blackstone, that I agree with Cohen L.J. and Lord Asquith⁹⁴ that if the matter were now *res integra* the law, they say "probably," while I am tempted to say "certainly," would refuse to give an action to the husband merely for loss of consortium due to negligence. It is too late now for the courts to deny an action which has existed for hundreds of years. It is an anomaly at the present day that a husband can obtain damages for an injury to his wife, but English law is free neither of some anomalies nor of everything illogical, but this is no reason for extending them. There is this about it that is neither anomalous nor illogical, still less unjust; a husband nowadays constantly claims and recovers for medical and domestic expenses to which he has been put owing to an injury to his wife. As to the first, I think his claim really lies in his legal obligation to provide proper maintenance and comfort, including medical and surgical aid, for his wife, and the fact that a wrong does cause that obligation to be incurred is regarded as giving him a right to recover, while the latter is truly a remnant, and perhaps the last, of his right to sue for the loss of servitium; for, to use Lord Wensleydale's words, it is to the protection of such material interests that the law attends rather than mental pain or anxiety.

This, in my opinion, disposes of the action but there remains the question whether in any case an action would lie for the impairment, as distinct from a total loss, of consortium. As this can now only arise in the case of a claim by a husband I feel some hesitation in dealing with it in a case which relates only to the loss by a wife. But as all the members of the Court of Appeal dealt with this matter and it was elaborately argued at the Bar I think one ought to express an opinion, and I am in agreement with the Court of Appeal. Consortium seems to me to be essentially an abstraction. Where the exercise of a profession or the call of duty involves prolonged absence abroad of one of the spouses there is not an interruption of consortium, nor is there because one of them may become a permanent invalid to be waited on and nursed by the other. Again there may be loss of affection but provided the spouses continue to live together as man and wife it seems to me that it still exists however different life may be from the days of the honeymoon. Sexual relations are doubtless a most important part of the marriage relation, but if age or illness or even disinclination impairs the potency of either of the spouses who continue to live together as husband

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⁹⁴ [1951] 2 K.B. 639, 666, 669.

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and wife I do not think the consortium is affected. It would be only if on this account one of them withdrew and decided to live apart. In truth I think the only loss that the law can recognize is the loss of that part of the consortium that is called servitium, the loss of service. And it is that to which Lord Wensleydale referred in the passage I have quoted above.

I would dismiss the appeal.

LORD OAKSEY. My Lords, I have had an opportunity of reading in print the opinion which is to be delivered by my noble and learned friend Lord Reid. I agree with it, and have nothing to add.

LORD MORTON OF HENRYTON. My Lords, on March 23, 1946, the husband of the appellant, a steel erector employed by the Steel Constructor Co., was working in the respondents' factory when he was accidentally struck by an overhead travelling crane and was severely injured. It was admitted that the circumstances rendered the respondents liable to Mr. Best in negligence, and he recovered £4,288 15s. 0d. in an action against them. The respondents were liable to Mr. Best because he was an invitee upon their premises and thus they owed a duty to him.

The appellant claimed that the respondents must pay her damages because, as a result of the accident to her husband (to quote her statement of claim) "she has been deprived of the opportunity of having further children and of normal marital relations, as a result whereof she suffers from nervousness, irritability and insomnia. The happiness of her married life has deteriorated and continues to deteriorate. She is restless and suffers from a degree of tachycardia."

My Lords, with one exception to which I shall shortly return, it has never been the law of England that an invitor, who has negligently but unintentionally injured an invitee, is liable to compensate other persons who have suffered, in one way or another, as a result of the injury to the invitee. If the injured man was engaged in a business, and the injury is a serious one, the business may have to close down and the employees be dismissed; a daughter of the injured man may have to give up work which she enjoys and stay at home to nurse a father who has been transformed into an irritable invalid as a result of the injury. Such examples could easily be multiplied. Yet the invitor is under no liability to compensate such persons, for he owes them no duty and may not even know of their existence.

There is thus no general principle of English law which would entitle the appellant to succeed in the present case. Nor is her claim justified by authority. It is true that a husband is entitled to recover damages for loss of consortium against a person who negligently injures his wife, but this exceptional right is an anomaly at the present day, as my noble and learned friend, Lord Goddard, has said. It is founded on old authorities decided at a time when the husband was regarded as having a quasi-proprietary right in his wife, and is now so firmly established that it could only be abolished by statute. A wife, on the other hand, was never regarded as having any proprietary right in her husband, and the old authorities do not help the appellant.

For the reasons which have already been stated by two of your Lordships, the case of *Place v. Searle*⁹⁵ is of no assistance to the appellant. It dealt with a very different cause of action, for a deliberate and malicious destruction of the consortium.

I express no opinion on the question whether consortium is one and indivisible. That question does not arise in the present case, and it may arise for decision hereafter upon a claim by a husband for a partial loss of consortium.

I would dismiss the appeal.

LORD REID. My Lords, I have had an opportunity of reading the speech of my noble and learned friend, Lord Goddard, and I am in complete agreement with it except on one point which, in his judgment and in mine, is not material to the decision of this case: the nature of a husband's right to sue for loss of consortium. I also feel some hesitation in dealing with this matter but I agree that in the circumstances one ought to express one's opinion about it.

In the old cases a number of words are used to describe the husband's loss or damage. He has, by the act of the wrongdoer, lost his wife's services, assistance, comfort, society, etc. Sometimes the word consortium is used in conjunction with one or more of these words; sometimes it appears to be intended to include them. I doubt whether there was any fixed practice. But it would seem that there was only one single cause of action in respect of loss in all these matters. There was not one action for loss of consortium and another for loss of servitium, and in the same cause of action loss or damage under any of these heads could properly be taken into account, though often the main

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emphasis might be on the value of the services or assistance which the husband had lost. The origin of the husband's right of action seems to have been that he was regarded as having a quasi-proprietary right, and I think that it included a right to his wife's society as well as to her services. I can see no sign of any difference in quality between his right to her assistance and his right to her society, and indeed it would be difficult to say where in fact assistance ends and society begins, either today or in the Middle Ages. No doubt her services and assistance had an additional value because her comfort and society went with them. I do not think that consortium was an abstraction: it seems to me rather to be a name for what the husband enjoys by virtue of a bundle of rights, some hardly capable of precise definition.

I do not think that it is open to doubt that an impairment of a wife's capacity to render assistance to her husband was enough to found an action. Certainly an injury which temporarily incapacitated her was sufficient, and I cannot find any ground for the view that an injury which did not produce complete incapacity at any time was insufficient even if it resulted in serious and permanent impairment of her capacity to render services. Any such injury might well deprive the husband to a large extent of his wife's comfort and society but at no time deprive him wholly of it, and I have seen nothing to lead me to think that in such a case that impairment of the consortium must be left out of account, and, if impairment of the consortium is enough, I have seen nothing to lead me to think that the destruction of a wife's capacity for sexual intercourse should not be regarded as such an impairment.

Appeal dismissed.

Solicitors: *W. H. Thompson; Corbin, Greener & Co., for Raworth, Lomas-Walker, Butterworth & Wilkinson, Harrogate.*

[HOUSE OF LORDS.]

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				AND		
RAILWAY EXECUTIVE	.	.	.	.	RESPONDENTS.	1952 May 5, 6, 7, 8; July 11.
<i>Negligence — Railway — Child trespasser — Injury by train — Implied licence.</i>						

A boy of nine having gone on to a railway line was injured by a train and brought an action against the owners of the railway, alleging negligence on their part. Evidence was called to show that other children from a neighbouring recreation ground, but not this boy, had been accustomed to break through the fence enclosing the line and had made a slide down the embankment, but the fence had been repaired whenever damage had been observed:—

Held, that the railway owners were not liable for his injuries. The boy was a trespasser and not a licensee and they were not obliged to do more than keep the premises shut off by a fence which was repaired when broken and was obviously intended to keep out intruders.

The onus on the plaintiff of establishing a licence is not discharged by showing that children have broken through a properly constructed fence which has been repaired when broken. Where the defendants know that unauthorized persons habitually trespass upon their property they must show that they resent intrusion and take steps to prevent it, but neither omission to take every possible step nor the knowledge that intrusion has occurred is in itself sufficient to support the inference of the grant of a tacit licence.

Cooke v. Midland Great Western Railway of Ireland [1909] A.C. 229 and *Lowery v. Walker* [1911] A.C. 10 distinguished.

APPEAL from the Court of Appeal (Singleton and Morris L.JJ. and Roxburgh J.).

This was an appeal from a judgment of the Court of Appeal dated July 25, 1951, setting aside a verdict of a jury and judgment entered thereon on the order of Jones J. dated February 13, 1951, awarding to the infant plaintiff, Terence Edwards, £6,000 damages for injuries, and to the adult plaintiff, William Edwards, his father, £300 special damages for his expenses, on the ground that those injuries and expenses resulted from the negligence and breach of duty, as occupiers of a railway, of the predecessors of

* *Present*: LORD PORTER, LORD GODDARD, LORD OAKSEY, LORD MORTON OF HENRYTON and LORD REID.

H. L. (E.) the defendants, the Railway Executive, their servants or agents.
1952 The plaintiffs appealed to the House of Lords.

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The facts are fully stated in the opinion of Lord Porter.

Platts-Mills for the appellants.
Beney Q.C. and *Neil Lawson* for the respondents.

The arguments appear sufficiently from their Lordships' opinions.

Their Lordships took time for consideration.

July 11. LORD PORTER. My Lords, this is an appeal by the appellants from an order of the Court of Appeal allowing an appeal by the respondents from, and setting aside the verdict and judgment directed to be entered in favour of, the appellants against the respondents on the trial of an action before Jones J. and a jury. The appellants were plaintiffs and the defendants were the mayor, aldermen and councillors of the Metropolitan Borough of Woolwich as first defendants and the respondents, the Railway Executive, as second defendants. The first defendants were successful in both courts below and are not concerned in this appeal.

The appellants' claim arose from an accident suffered by the infant appellant, Terence Edwards, on July 15, 1947, whilst he was upon the respondents' railway line at Eltham in the county of Kent. He was then aged nine years and he sustained electric burns and shock from contact with a live electric rail upon the up line of the respondents' railway and lost his right arm close to the shoulder owing to the subsequent passage over it by a train of the respondents which was travelling along that line.

The place at which the accident occurred was a section of the respondents' railway between Eltham in the east and Kidbrooke in the west where there was a double track of line laid on the top of a steep embankment which formed part of the premises of the respondents. At the foot of this embankment on its northern side there ran immediately alongside the railway's property for a distance of about 1,000 yards a public recreation ground and children's playground controlled by Woolwich Corporation. Between the embankment and the recreation ground a fence had been erected by the respondents consisting of

concrete posts holding strands of wire which were passed through the posts and fixed in position by split-pins.

The appellants based their claim on an allegation that the respondents knew that the embankment and lines constituted a lure or attraction for children, that children frequently passed from the recreation ground to the embankment and lines to play and slide, and that, notwithstanding this knowledge, they failed to take any proper steps to prevent children from going on to the embankment and the lines or to warn children against the danger of so doing; that in these circumstances the respondents permitted children to come upon their premises as licensees and failed to guard them against dangers of which they well knew; that they were in breach of duty under section 68 of the Railway Clauses (Consolidation) Act, 1845 (8 & 9 Vict. c. 20), in failing properly to fence the railway, and (by amendment) further alleged that the respondents' servant, the driver of the train which passed over the infant appellant, was negligent in failing to see him or in failing to stop the train in time to avoid him.

The respondents denied the appellants' allegations and contended that the infant appellant was a trespasser and that the respondents, their servants and agents were not in breach of any duty owed to the infant appellant as such.

In order to establish the appellants' case evidence was called which (if believed, as it was believed, by the jury) proved that for many years before the accident children had from time to time been accustomed to climb through the fence and to toboggan down the embankment near where the accident occurred. This they did by pulling out the split-pins which attached the wire of the fence to its posts and by trampling on or breaking the wire itself. There was some evidence that children had been known to climb on to the embankment from other places, but it was somewhat vague in character and is, in my opinion, irrelevant to the decision of the present case. The infant appellant had never himself been previously on the embankment and apparently had no knowledge of the practice of sliding down it or, indeed, that other children were accustomed to go there. The fence itself was repaired when it was observed to have been interfered with, both by the employee of the Woolwich Corporation who was in charge of the playground and by an employee of the respondents. It appears that frequent repairs were required. There was evidence, however, that on the morning of July 15, 1947, the fence was in proper repair and no evidence to the contrary.

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The accident occurred at about 7.30 p.m. on that day. Shortly before this time the infant appellant and three other boys, two named Connor and one named Gooch, were playing in the recreation ground with a ball. Someone then threw or kicked the ball up the embankment and the four boys went through the fence either to fetch the ball or, in the case of the infant appellant and Gooch, possibly because they had been dared by one of the Connor boys to do so. When they got through they found a number of children sliding down the embankment on tins and pieces of wood on a slide which started about three feet from the top of the embankment and ended somewhere about the fence at the bottom. They had no difficulty in getting through the fence, since it is in evidence that there was a gap high enough to allow a boy to pass through without stooping, though a man who afterwards rescued Terence found himself unable to reach or return from the spot without crawling.

Apparently after the children had got through the fence, if not before, one of the Connor boys dared Gooch and Terence to go across the lines before a train came past and look for the ball. The two Connors then, it seems, went to slide with the other children, whereas Terence and Gooch went on up the embankment, under a sort of low wire fence at the edge, passed about 12 feet across the top of the embankment and then reached and crossed both the up and down lines. The line was electrified so that in doing so they had to cross seven sets of metals, i.e., four rails constituting the running track and three live rails. When they got to the other side of the track they failed to find the ball and turned to run back at the moment at which the down train was just starting to leave Kidbrooke station. Bryan Gooch got over the rails safely but Terence slipped or tripped and fell on the up track, between the most southern of the lines (which was a live rail) and the running line which lies immediately next to and about a distance of one foot from it. In that position he lay in contact with the live rail unable to move, and shortly afterwards was run over by an up train before anyone could reach and rescue him. After his arm had been severed he was rescued with considerable courage and skill by a Mr. O'Neill and handed over to an ambulance.

Before this day Terence had never been through the fence and apparently never knew of the gaps in it or of the tobogganing and never wanted to or did toboggan when he got there. There was no allurements in his case: he went on to the embankment to get his ball and over the rails because he was dared to do so.

He had apparently been scolded for going through the fence by the corporation's employee in charge of the recreation ground and warned by his father not to do so. He knew that the fence was there to keep him and the other children out, that it was wrong to go on the embankment, and that he had no right to do so. He further knew that it was dangerous to cross the lines but may not have appreciated the danger of the live rail.

For the appellants it was urged that children, and in particular adventurous children, are not readily deterred by fences which it is easy to get through, that the evidence showed that a ganger and five men passed along the top of the embankment every week day and that on Saturdays the ganger passed along the bottom and saw and repaired the damage: that even if he did not see the children tobogganing, which was unlikely, he must have seen the signs of the slide, as indeed he confessed he did after the accident, that the engine drivers, whether of motor or steam engines, must have seen the tobogganing as they passed, that the jury were entitled to disbelieve them when they said they did not, and that the failure to take steps more strenuous than merely repairing the fence amounted, in the case of persons whose knowledge of the children's habits a jury was entitled to infer, to a licence to the children to be there. It was further contended that if he was looking the driver of the train which passed over the boy's arm must have, or at any rate ought to have, seen the boy and could have stopped in time.

At the end of the appellants' case the respondents submitted that there was no evidence from which a jury could find either licence or negligence and that the boy, being a trespasser, must take the premises as he found them. Jones J., however, ruled that there was evidence to go to the jury and the respondents then called their witnesses. The facts set out above are those given in evidence by both sides, and as the respondents elected to give evidence they are bound by anything emerging in the course of the trial whether from their own or their opponents' witnesses.

At the end of the case the learned judge put certain questions to the jury with the assent of counsel and these must be set out in full with the answers:

"Q. 1 (a). Did the infant plaintiff go on to the defendants' "railway embankment with the tacit permission of defendants' "servants? A. Yes.

"(b) Did the infant plaintiff go on to the defendants' railway "line with the tacit permission of defendants' servants? A. Yes.

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“ Q. 2. If the infant plaintiff went on the defendants’ rail-
“ way embankment or line with the express or tacit permission
“ of defendants’ servants—

“ (a) Did the defendants’ servants expose him to any trap or
“ concealed danger of which they knew but of which he did not
“ know? A. Yes.

“ (b) Did the defendants’ servants expose him to any object
“ of attraction that contained danger, that would not have been
“ a trap to an adult, but with which a child was particularly
“ likely to be tempted to meddle? A. Yes.

“ (c) What (if any) was the trap or concealed danger or object
“ of attraction to which defendants’ servants exposed the infant
“ plaintiff? A. (1) Live rail; (2) the ‘ slide.’

“ (d) Was the driver of the up train negligent in failing to
“ stop the train before it ran over the infant plaintiff’s arm?
“ A. Yes.

“ (e) Was the driver of the down train negligent in not seeing
“ the infant plaintiff on the up line, and could he have prevented
“ the accident if he had seen him? A. (1) No; (2) Yes.

“ Q. 3. If the infant plaintiff went on to the defendants’ line
“ without the express or tacit permission of the defendants’
“ servants, was the driver of the up train that injured the infant
“ plaintiff guilty of reckless disregard of the infant plaintiff’s
“ safety? A. See 1 (b).

“ Q. 4 (a). Was the infant plaintiff negligent in going on to
“ the line? A. In view of his age, no.

“ (b) If so, was his negligence the sole cause of his injuries?
“ [No answer.]

“ (c) Did the infant plaintiff realize that it was dangerous to
“ go on to the line? A. No.

“ Q. 5 (a). Damages (if any) on the basis of the defendants’
“ servants having been negligent but the infant plaintiff not
“ having been negligent in any respect? A. £6,000.”

The learned judge had already ruled that there was no breach of the statutory duty to fence, but upon the verdict of the jury entered judgment for the sum of £6,000. From this verdict and judgment the respondents appealed to the Court of Appeal on the ground that there was no evidence on which the jury could find as they did and there was no evidence of any allurement or that the infant plaintiff was a licensee or other than a trespasser or that the driver of the train was negligent. The Court of Appeal allowed the appeal, holding that there was no such evidence and that even if it could be held that a licence must be inferred for

the children who were tobogganing, yet no such licence could be inferred for this child nor was there any allurement to him.

My Lords, if there was evidence to justify the jury's findings the appellants must succeed. The only question, therefore, for your Lordships is whether the case should or should not have been withdrawn from the jury.

The first matter for decision accordingly is whether there was any evidence from which it could be inferred that children from the recreation ground had become licensees to enter the respondents' premises and toboggan down the embankment.

The appellants support their claim on the authority of such cases as *Cooke v. Midland Great Western Railway of Ireland*¹ and *Lowery v. Walker*.² I refrain from referring to the many cases which have not reached your Lordships' House inasmuch as the principle is, I think, clear—the application alone difficult. There must, I think, be such assent to the user relied upon as amounts to a licence to use the premises. Whether that result can be inferred or not must, of course, be a question of degree, but in my view a court is not justified in lightly inferring it. In *Cooke's* case³ there was an open and well worn pathway leading to a turntable on which children could ride and which was an allurement to them. Apparently the whole station staff in that case knew of the practice of children to congregate there and ride upon the turntable and no attempt was made to stop them. Similar considerations apply to *Lowery v. Walker*.⁴ The ground of the decision is best set out in the words of Lord Loreburn L.C. The facts of the case were that the defendant put a dangerous horse into a field through which he knew the public were accustomed to pass as a short cut to the station. Lord Loreburn says⁵: "I think in substance it" (i.e., the county court judge's finding) "amounts to this: that the plaintiff was not proved to be in this field of right; that he was there as one of the public who habitually used the field to the knowledge of the defendant; that the defendant did not take steps to prevent that user; and in those circumstances it cannot be lawful that the defendant should with impunity allow a horse which he knew to be a savage and dangerous beast to be loose in that field without giving any warning whatever, either to the plaintiff or to the public, of the dangerous character of the animal."

I mention these cases because they deal with circumstances

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¹ [1909] A.C. 229.

² [1911] A.C. 10.

³ [1909] A.C. 229.

⁴ [1911] A.C. 10.

⁵ Ibid. 12.

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having some resemblance to the present case, but each case must be determined on its own facts. The onus is on the appellants to establish their licence, and in my opinion they do not do so merely by showing that, in spite of a fence now accepted as complying with the Act requiring the respondents to fence, children again and again broke their way through. What more, the appellants were asked, could the respondents do? Report to the corporation? But their caretaker knew already. Prosecute? First you have to catch your children and even then would that be more effective? In any case I cannot see that the respondents were under any obligation to do more than keep their premises shut off by a fence which was duly repaired when broken and obviously intended to keep intruders out.

It will be observed that in expressing this opinion I have assumed that the servants of the Railway Executive had knowledge that children were accustomed to go there. I am not convinced that they had this knowledge, but it may have been legitimate for the jury to find that the ganger who repaired the fence must have known, although I am not prepared to accept the proposition that any inference can be drawn from the fact that trains passed up or down, or to hold that their drivers ought or must be taken to have seen the children. However that may be, and even assuming that the respondents had knowledge of the intrusion of children on to the embankment, the suggestion that that knowledge of itself constitutes the children licensees, in my opinion, carries the doctrine of implied licence much too far, though no doubt where the owner of the premises knows that the public or some portion of it is accustomed to trespass over his land he must take steps to show that he resents and will try to prevent the invasion.

An open pathway, as in *Cooke v. Midland Great Western Railway of Ireland*,⁶ or a knowledge that a track is and has long been constantly used, coupled with a failure to take any steps to indicate that ingress is not permitted, as in *Lowery v. Walker*,⁷ may well amount to a tacit licence. But I do not accept the theory that every possible step to keep out intruders must be taken and, if it is not, a licence may be inferred. The whole question has been elaborately discussed in *Latham v. R. Johnson & Nephew Ltd.*⁸ by Hamilton L.J., and in your Lordships' House in *Robert Addie & Sons (Collieries) Ltd. v. Dumbreck*,⁹ where the plaintiff failed though the circumstances were at least

⁶ [1909] A.C. 229.⁸ [1913] 1 K.B. 398.⁷ [1911] A.C. 10.⁹ [1929] A.C. 358.

as favourable to success as those in the present case. In that case there was a contrivance actually dangerous to children in a field, surrounded, it is true, by a hedge but by a hedge totally inadequate to keep out the public. The field itself was, as the respondents knew, used as a playground by young children and the contrivance was dangerous and attractive to children. The accident occurred because the contrivance (a wheel) was set in motion without any precaution being taken to avoid an accident to persons frequenting the field. There, as here, some of the children at times were warned—there, as here, the injured boy had been warned by his father, but no adequate fencing existed nor were any deficiencies continuously renewed. Nevertheless it was held that the boy, though only four years old, was a trespasser and went on the premises at his own risk.

My Lords, I quote these cases not because the facts and circumstances of one case can be applied to another but rather to show the attitude which has been adopted in dealing with cases of this kind. It is for the plaintiffs to establish a licence, and notwithstanding the finding of the jury in this case I do not think they have done so. In my view, there was no evidence to justify that finding.

This conclusion is decisive of the case, but one or two further matters were argued which ought, I think, to be mentioned.

It was submitted on behalf of the respondents that even if it must be taken that children were licensed to go upon the embankment, yet they were not even tacitly permitted to go on to the track: there was no evidence that they did so and no allurement to take them there. My present inclination is to regard this contention as correct since there was no evidence that any child had been seen passing on to the track from the slide, and the evidence of one instance in which a child had been killed on the line in the neighbourhood had no bearing on the question. The best way in which it could be put on behalf of the plaintiff would be that finding a number of children playing on the embankment and no proper fence keeping him from the lines, it would be reasonable to infer that the licence, if there was one, extended over the whole embankment from one side to the other. Whether, however, such an argument could prevail at all and whether it could do so in face of the fact that Terence knew he was not allowed even to go on the embankment need not be determined in the present action.

There only remains to be considered the allegation that the driver of the train concerned was negligent—recklessly negligent

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indeed—if the boy was a trespasser. I can discover no evidence to justify such a finding. Even to his rescuer who had been notified of his presence and was looking for him he was half hidden where he lay between the running and live rail.

The engine driver had to watch the signals and be generally alert. No doubt he would have seen the boys if they had been running across the line. As it was there was nothing to draw his attention to what, at most, may have been an arm across a rail and even a careful watch might well have missed it. Nor, indeed, is there any sufficient evidence to lead to the conclusion that even if the boy had been seen the train could have been pulled up in time.

It was an unfortunate accident in which one's sympathies must go out to the injured boy, but sympathy is an inadequate reason for imputing blame. I would dismiss the appeal.

LORD GODDARD. My Lords, when a person is injured on land or in a place where he has no business to be, efforts are frequently made, sometimes with success due perhaps largely to sympathy, to establish that the injured person was where he was with the leave and licence of the landowner or occupier, even though by every canon of common sense it is perfectly plain that the latter, had he been asked before the accident, would have said that he objected strongly to the uninvited person coming on his land. And if it be a child that is injured reliance is sure to be placed on that hard worked case *Cooke v. Midland Great Western Railway of Ireland*,¹⁰ which was in fact decided on points as unusual and special as any could be. If an owner, whether a railway company or a private individual, for years has allowed part of his premises to be used as a children's playground some care must be taken for the safety of those who will take advantage of the facility or amenity that appears to be offered them. If a landowner allows them to play in proximity to a dangerous thing that he maintains on his land, he must guard it or make it safe. But repeated trespass of itself confers no licence; the owner of a park in the neighbourhood of a town knows probably only too well that it will be raided by young and old to gather flowers, nuts or mushrooms whenever they get an opportunity. But because he does not crown his park wall with a chevaux de frise or post a number of keepers to chase away intruders how is it to be said that he has licensed what he cannot prevent? Nor can

¹⁰ [1909] A.C. 229.

I see, if he knows that the trespassers are children, that he is under any obligation to ask their schoolmasters to lecture them on the subject and he would surely be an optimist if he supposed that that would do any good. In this respect children, small boys especially, resemble burglars; if they want to get in they will, take what precautions you may.

Now, to find a licence there must be evidence either of express permission or that the landowner has so conducted himself that he cannot be heard to say that he did not give it. To suppose that a railway authority consciously gave permission to small boys to wander or play on their embankments or lines which are in active use by electric trains is so absurd that no one would suggest it. What then have they done in this case to lead anyone to suppose that they may go onto their property to play? They put up a fence which is repaired as often as their linesmen see it broken. No one can pretend that the embankment itself is an allurement, which only means a form of invitation. What is said is that because children have from time to time used part of it as a slide, so that the place where they have indulged in this pastime can be seen, that constitutes an allurement, or so I understand the argument. The Railway Executive provided neither slide nor toboggan. That they did not use every method that could be devised for keeping children off the embankment may well be true. Had they to provide watchmen to guard every place on the railways of the Southern Region where children may and do get on to embankments and lines, railway fares would be a great deal higher than they are already. Had I thought that there was any evidence of a licence to go onto the embankment I should for myself not distinguish between the embankment itself and the railway lines which run along the top of it. If railway authorities were to invite or to allow children to play on the embankment it seems to me as certain as anything can be that they will go onto the lines and at least they ought to be protected by some additional fence from so doing. I can see no evidence at all of any licence in this case and the injured child was a mere trespasser. He went onto the embankment and thence onto the lines because another boy had thrown his ball over and he was then dared to go after it. It follows therefore that unless there is evidence of wilful or reckless behaviour on the part of the motorman in failing to stop the train before it ran over the boy he can have no case. There is no evidence to support such a charge against the driver. A man can only act

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recklessly with regard to the safety of another if he knows of, or has reason to believe in, the presence of that other. I can well understand that as trial by jury had been ordered in this case Jones J. thought it better to take a verdict so as to guard against the possibility of a new trial being ordered, but in my opinion he ought to have entered judgment for the defendants non obstante and I agree with the Court of Appeal that the action fails.

I would dismiss the appeal.

LORD OAKSEY. My Lords, I agree that this appeal should be dismissed.

In spite of Mr. Platts-Mills' able argument I have come to the conclusion that there was no evidence that the appellant Terence Edwards was a licensee upon any part of the respondents' premises and that as there is, in my opinion, no evidence of any reckless disregard of the appellants' safety by any of the respondents' servants, the appellant cannot recover any damages for the accident from which he suffers. It is true that there was evidence that children from the recreation ground were in the habit of using the embankment for a sort of toboggan slide and there was some evidence that this habit had continued for several years. On the other hand, the respondent company had erected and maintained and repaired a strong wire fence between the recreation ground and the embankment, and although this fence was often broken and showed obvious signs of having been broken for the purpose of obtaining access to the toboggan slide on the embankment, yet it was, according to the appellants' own witness, Griffiths, continually being repaired. There was also evidence that it was being continually repaired by Bell, the respondents' ganger, and his men.

In these circumstances the question appears to me to be whether there was evidence from which it could reasonably be inferred that the respondents acquiesced in this use of the embankment by children from the recreation ground. In my opinion, in considering the question whether a licence can be inferred, the state of mind of the suggested licensee must be considered. The circumstances must be such that the suggested licensee could have thought and did think that he was not trespassing but was on the property in question by the leave and licence of its owner.

Now, in the present case, in view of the fact that the children

must have known that the fence was being continually repaired and were being continually warned by Griffiths not to go on the embankment, they could not have thought that they had the leave and licence of the owners to go on the embankment. The only way in which the appellants' argument can, in my opinion, be put is to suggest that although they knew of Griffiths' warnings and Griffiths' repairs to the fence, they did not know and had no reason to think that the respondent authority objected. I do not, however, consider that children can be thought to have made any such distinction between the attitude of Griffiths and the attitude of the respondent authority, and there is the uncontradicted evidence of Bell that he and his men continually repaired the fence. It is, therefore, in my opinion, impossible to draw the inference that the railway authority, which was repairing the fence, was acquiescing in its being broken down and the embankment used for the slide.

LORD MORTON OF HENRYTON. My Lords, in my view there was no evidence in this case to justify the finding by the jury that the infant appellant went upon the respondents' railway embankment and railway line with the tacit permission of the respondents' servants. This being so, this small boy was nothing but a trespasser. His serious injuries must necessarily awake our sympathy, but the respondents were in no way to blame for these injuries. The duty of an occupier of premises towards a trespasser is set out as follows by Lord Hailsham L.C. in *Robert Addie & Sons (Collieries) Ltd. v. Dumbreck*¹¹: "Towards the
"trespasser the occupier has no duty to take reasonable care
"for his protection or even to protect him from concealed danger.
"The trespasser comes on to the premises at his own risk. An
"occupier is in such a case liable only where the injury is due
"to some wilful act involving something more than the absence
"of reasonable care. There must be some act done with the
"deliberate intention of doing harm to the trespasser, or at least
"some act done with reckless disregard of the presence of the
"trespasser." In the present case it was not, and could not be, suggested that the driver of the train which cut off the boy's arm had a "deliberate intention of doing harm" to him; and there is, in my opinion, no evidence that he acted "with reckless
"disregard of the presence of the trespasser." I agree that this appeal must be dismissed.

H. L. (E.)

1952

EDWARDS
v.RAILWAY
EXECUTIVE.

Lord Oaksey.

¹¹ [1929] A.C. 358, 365.

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1952

EDWARDS
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EXECUTIVE.

LORD REID. My Lords, I have had an opportunity of reading the speech of my noble and learned friend, Lord Goddard, and I agree with it.

Appeal dismissed.

Solicitors: *Walter O. Stein; M. H. B. Gilmour.*

END OF VOLUME AND OF APPEAL CASES FOR 1952.

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